No. 90-7477-CFX
Status: GRANTED

Title: William Lewis Smith, Petitioner
v.
Wayne S. Barry, et al.

Docketed:
March 22, 1991

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Goldblatt,Steven

Counsel for respondent: Bamberger,David, Cannon,Evelyn O.

Entry	Date	Note	Proceedings and Orders
1	Mar 22 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Apr 19 1991		Brief of respondent Dr. Wayne S. Barry in opposition filed.
4	Apr 24 1991		Reply brief of petitioner William Smith filed.
5	Apr 25 1991		DISTRIBUTED. May 9, 1991
6	May 7 1991	P	Response requested -- BRW. (Due June 6, 1991)
7	Jun 5 1991		Brief of respondents Victor, Turner, Hall, Brown, Jackson, and Wilkins in opposition filed.
8	Jun 12 1991		REDISTRIBUTED. June 27, 1991
10	Jun 28 1991		Petition GRANTED.
			**********
11	Jul 23 1991		Joint appendix filed.
12	Aug 26 1991		Record filed.
		*	USAP 4-8 vol.
13	Aug 26 1991		Brief of petitioner William Smith filed.
14	Sep 10 1991		Brief of respondents Wayne S. Barry, et al. filed.
15	Oct 15 1991		SET FOR ARGUMENT MONDAY, DECEMBER 2, 1991. (3RD CASE)
16	Oct 24 1991		CIRCULATED.
17	Oct 29 1991	X	Reply brief of petitioner William Smtih filed.
18	Dec 2 1991		ARGUED.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WILLIAM LEWIS SMITH,
Petitioner,

v.

WAYNE S. BARRY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether an appellate brief may be construed as a valid notice of appeal within the meaning of Fed. R. App. P. 3(c) when it contains all of the information required of a notice of appeal, is timely filed within thirty days of a district court's final order, and notifies the court and all opposing parties of the appellant's intention to appeal?

LIST OF PARTIES TO THE PROCEEDING

Parties Below:

In addition to William Lewis Smith, the following prison personnel were also parties to the proceeding below: Jon. P. Galley, George H. Collins, Commander Captain Carpenter, Sergeant R. Victor, Sergeant Arnold Turner, Officer R. Hall, Officer R. Brown, Officer Jackson, Officer Wilkins, Robert Ellis, and Daniel Porecki.

Parties Before This Court:

The following parties are parties to the proceeding before this Court: William Lewis Smith, Wayne S. Barry, Sergeant R. Victor, Sergeant Arnold Turner, Officer R. Hall, Officer R. Brown, Officer Jackson, and Officer Wilkins.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No.

WILLIAM LEWIS SMITH,
Petitioner,

v.

WAYNE S. BARRY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William Lewis Smith petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., infra, 1a-4a),[1] is reported at 919 F.2d 893. The Memorandum Opinion and Order of the United States District Court for the District of Maryland (Pet. App., infra, 9a-11a), has not been reported.

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[1] For the purposes of this Petition, citations to "Pet. App." refer to the Appendix filed with this Petition which contains the opinions and orders of the lower courts in this case. Citations to "App." refer to the joint appendix filed in the Fourth Circuit. Trial transcripts not included in the joint appendix are cited by date and page number, e.g., Tr. 2/24 at 155. Documents in the record not included in the joint appendix are cited as R #.

JURISDICTION

The judgment of the court of appeals (Pet. App., infra, 5a-6a), was entered on November 29, 1990, and a Petition For Rehearing and Suggestion For Rehearing In Banc were denied on December 26, 1990. Pet. App., infra, 7a. This Petition For Certiorari is being filed within ninety days of the date of the Fourth Circuit's order denying the Petition For Rehearing and Suggestion For Rehearing In Banc. Pet. App., infra, 7a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

The relevant portions of Federal Rules of Appellate Procedure 3 and 4 provide as follows:

Rule 3. Appeal as of Right--How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . .

* * *

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. . . .

* * *

Rule 4. Appeal as of Right--When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the

notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from . . . .

* * *

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b) . . . the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. . . .

The Fourth Circuit's Local Rules and Internal Operating Procedures provide as follows:

Loc. R. 34(b) Informal Briefs

Whenever . . . any pro se appeal shall be filed, the Clerk shall notify the appellant that he may file, within twenty-one days after receipt of such notice, an informal brief, describing the grounds upon which he claims he is entitled to relief and setting forth the merits of his appeal. Any such informal brief filed by any party shall be considered, together with the record and other relevant papers, by the panel to which the proceeding has been referred.

Parties proceeding pursuant to this section shall be provided copies of this local rule by the clerk.

I.O.P. - 34.6 Informal Briefs.

Local Rule 34(b) has established a procedure for the filing of "informal briefs" in certain cases. The informal brief may be submitted on a form provided by the Clerk and should provide specific information about the case in response to questions appearing on the form. The parties need not limit their briefs solely to the form. It is not necessary to cite cases in an informal brief. An additional supporting memorandum may be submitted if a party deems it necessary in order to address adequately the issues raised. Two copies of the brief and memorandum, if any, must be filed with the Court and a copy mailed to opposing counsel.

Once an informal briefing schedule has been established the parties may file a formal brief only with the permission of the Court. The Court initially reviews cases that are informally briefed under its procedures set forth in Local Rule 34(a) pertaining to pre-argument review. The Court does

not limit its review to the issues raised in informal briefs, but reviews the entire record on appeal for possible meritorious issues.

STATEMENT OF THE CASE

William Lewis Smith, an inmate at Maryland State Penitentiary, brought this action pursuant to 42 U.S.C. § 1983 against the State Commissioner of Corrections, the Warden of Maryland Penitentiary, several correctional officers, two staff psychologists, Dr. Porecki and Dr. Ellis, and one medical doctor, Dr. Barry, claiming violations of his eighth and fourteenth amendment rights. App. 13-48. Smith suffers from a disorder which prevents him from walking or placing any weight on his legs and feet. Tr. 2/23 at 140. In his suit, he alleged, inter alia, that the prison's medical, psychological, and custodial staffs denied him a wheelchair for over two years, App. 13-48, and that his inability to walk, combined with the defendants' decision to force him to exist without a wheelchair, resulted in sustained inhuman treatment.[2] App. 13-48.

One of the defendants was Wayne S. Barry, a private physician who treated Smith and generally provided medical services to inmates at the penitentiary pursuant to a contract with the State. App. 54-56. After being served with the complaint, Barry filed a motion for his dismissal under Fed. R. App. P. 12(b), alleging that he provided nonsupervisory,

[2] The district court appointed counsel for Smith. Counsel remained in the case through the verdict and post trial motions but did not represent Smith on appeal.

noncustodial medical services to inmates and, therefore, did not act under color of state law as required by 42 U.S.C. § 1983. R. 23.

Relying on Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984), cert. denied, 471 U.S. 1132 (1985), the district court entered an order dismissing Barry. Pet. App. 13a-17a. In Calvert, the Fourth Circuit held that physicians who provide nonsupervisory and noncustodial medical services to inmates pursuant to a contract with the state do not act under color of state law. Calvert, 748 F.2d at 864.

Regarding the correctional officers, Smith claimed that six guards physically abused him and were deliberately indifferent to his medical needs because they intentionally denied him a wheelchair. At the conclusion of the plaintiff's case, the district court directed a verdict in favor of all the prison guards as to the claim regarding denial of the wheelchair. App. 178-97. The excessive force claims went forward, and the jury found in favor of the guards. R. 57.

The jury also found that the two psychologists, Daniel Porecki and Robert Ellis, were deliberately indifferent to Smith's serious medical needs and awarded Smith $15,000 in damages. Pet. App. 9a. The two psychologists filed a motion for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b). App. 59-67. While the Rule 50(b) motion was pending, Smith filed a notice of appeal in this case. App. 75-77. Under Fed. R. App. P. 4(a)(4), "[a] notice of appeal filed

before the disposition of [a Rule 50(b) motion] shall have no effect." Thus, Smith's notice of appeal was a nullity. However, no party moved for dismissal, and the appeal proceeded. The district court denied the Rule 50(b) motion on April 13, 1988. Pet. App. 9a-11a.

Counsel for appellee Barry was the first to respond to Smith's appeal. App. 83-107. In the Fourth Circuit, under Loc. R. 34(b), when a pro se appeal is filed, the court clerk sends preprinted appellate brief forms to all the litigants to the proceeding.[3] These forms are entitled informal briefs. On

[3] The Fourth Circuit Loc. R. 34(b) provides:

Whenever . . . any pro se appeal shall be filed, the Clerk shall notify the appellant that he may file, within twenty-one days after receipt of such notice, an informal brief, describing the grounds upon which he claims he is entitled to relief and setting forth the merits of his appeal. Any such informal brief filed by any party shall be considered, together with the record and other relevant papers, by the panel to which the proceeding has been referred.

Parties proceeding pursuant to this section shall be provided copies of this local rule by the clerk.

In addition, the Fourth Circuit's Internal Operating Procedure 34.6 provides:

Local Rule 34(b) has established a procedure for the filing of "informal briefs" in certain cases. The informal brief may be submitted on a form provided by the Clerk and should provide specific information about the case in response to questions appearing on the form. The parties need not limit their briefs solely to the form. It is not necessary to cite cases in an informal brief. An additional supporting memorandum may be submitted if a party deems it necessary in order to address adequately the issues raised. Two copies of the brief and memorandum, if any, must be filed with the Court and a copy mailed to opposing counsel.

Once an informal briefing schedule has been established the parties may file a formal brief only with the permission of the Court. The Court initially reviews cases that are informally briefed under its procedures set forth in Local Rule 34(a) pertaining to pre-argument review. The Court does not limit its review to the issues raised in informal briefs, but reviews the entire record on appeal for possible meritorious issues.

April 28, 1988, Barry's counsel submitted an informal brief relying entirely on Calvert v. Sharp to support the propriety of his dismissal from the case. App. 83-107. On May 4, 1988, twenty days after the Rule 50(b) motion was denied and the judgment became final, Smith submitted an informal brief[4] requesting that the Fourth Circuit grant him a "new trial on all issues triable by Jury." Pet. App 19a. This informal brief was served on all parties to this appeal, including Barry. Pet. App. 20a-21a.

On June 20, 1988, this Court decided West v. Atkins, 487 U.S. 42 (1988), which overruled Calvert v. Sharp. On June 24, 1988, Barry filed a supplement to his informal brief acknowledging that Calvert, the authority on which he relied to support his dismissal as a defendant in this action, had been effectively overruled by this Court. App. 112-15. Barry then asserted, for the first time,[5] that Smith's appeal should be dismissed because Smith failed to properly perfect his appeal after filing it prematurely. Some of the remaining State employees, having previously filed a timely appeal after the denial of the Rule 50 motion, moved to withdraw their appeals and

[4] Smith's informal brief is contained in the Appendix filed with this Petition. Pet. App. 18a-21a.

[5] It was only after West was decided and counsel for Barry realized that he could not defend Barry's dismissal from the case on the merits that he reviewed the case for a technical basis upon which to defend the ruling below.

stated "[we] move this Court . . . to proceed with Appellant's Pro Se Appeal." App. 132-33. They further declared that they "[stood] ready to defend the appeal filed in Pro Se by Appellant William Lewis Smith." Id. The Fourth Circuit then appointed counsel for Smith and asked for formal briefing.

On November 29, 1990, a panel of the Fourth Circuit dismissed Smith's appeal for lack of jurisdiction, finding that his notice of appeal was untimely and that his informal brief could not substitute for a notice of appeal. Pet. App. 1a-4a.

The court acknowledged a "functional equivalent" test under Fed. R. App. P. 3(c) which is used to determine whether another document will substitute as a notice of appeal and cited decisions, including two from this Court, which allow documents to substitute as notices of appeal when they meet this test. Pet. App. 3a.

The court noted three reasons why a "functional equivalent" analysis was inappropriate. Pet. App. 3a-4a. First, the Fourth Circuit adopted the position of the Fifth Circuit that a brief which is the "functional equivalent" of a notice of appeal may never serve as a notice of appeal, and rejected a contrary holding of the Third Circuit. Pet. App. 4a. Second, the court also found that the "functional equivalent" analysis should not be applied because Smith's brief was written on a preprinted form prepared by the Fourth Circuit clerk's office. Pet. App. 3a-4a. Finally, a "functional equivalent" analysis was not applied because Smith's court appointed trial attorney, who was not

representing him on appeal, wrote him a letter advising him that his notice of appeal was invalid. Pet. App. 4a. The court offered no explanation as to why these factors preclude application of a "functional equivalent" analysis.

REASONS FOR GRANTING THE PETITION

This case presents an important question regarding the proper construction of Fed. R. App. P. 3(c). The panel refused to allow Smith's pro se brief to substitute as a notice of appeal even though it contains all of the information required by a notice of appeal, was filed 20 days after entry of final judgment, and notifies the court and the opposing parties of Smith's intent to take an appeal. The panel decision, while aligning the Fourth Circuit with at least two other courts of appeals, directly conflicts with two circuits on this fundamental question of federal appellate jurisdiction. Pet. App. 4a.

This Court, in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), stated that "if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." Torres, 487 U.S. at 316-17. Nevertheless, as a result of the panel's decision, the Fourth, Fifth, and Federal Circuits will never allow an appellate brief to serve as the "functional equivalent" of a notice of appeal even when it otherwise meets the requirements of the appellate

rules. See Smith v. Galley, 919 F.2d 893, 896 (4th Cir. 1990); Pet. App. 4a; United States v. Cooper, 876 F.2d 1192, 1196 (5th Cir. 1989); Jurgens v. McKasy, 905 F.2d 382, 385 n.4 (Fed. Cir. 1990). In contrast, the Ninth and Third Circuits have specifically ruled that an appellate brief may, in some circumstances, substitute as a notice of appeal. Allah v. Superior Court, 871 F.2d 887, 889 (9th Cir. 1989); Frace v. Russell, 341 F.2d 901, 903 (3d Cir.), cert. denied, 382 U.S. 863 (1965). Further review of the court of appeals' decision by this Court is therefore warranted in order to resolve this division of authority on a jurisdictional question under the federal rules.

1. The question presented in this case has divided the courts of appeals. The court below relied on the Fifth Circuit decision of United States v. Cooper, 876 F.2d 1192 (5th Cir. 1989), and the Eleventh Circuit decision of Florida Women's Medical Clinic, Inc. v. Smith, 706 F.2d 1172 (11th Cir. 1983), to conclude that a brief cannot substitute as a notice of appeal. Pet. App. 1a-4a. The panel adopted the following language of the Fifth Circuit in Cooper:

> Faced squarely with the issue, we now determine that an appellate brief will not substitute for a notice of appeal, even if it otherwise meets the requirements of Fed. Rules App. P. 3 and 4. The Federal Rules of Appellate Procedure envision the notice of appeal and the appellate brief as two separate filings. To collapse the two into one would, as the Eleventh Circuit implied, 'eliminate entirely the requirement for the filing of a notice of appeal.'

Pet. App. 4a (quoting Cooper, 876 F.2d at 1196 (quoting Florida

Women's Medical Clinic, 706 F.2d at 1173)).[6] The panel then recognized a split in the circuits by referencing the contrary position of the Third Circuit. Pet App. 4a. Finally, the panel concluded that it was in "agree[ment] with the Fifth and Eleventh Circuits . . . that, although we should and do afford pro se litigants latitude where warranted, we are not free to rewrite the Federal Rules of Appellate Procedure. The requirements of Rule 3 are jurisdictional and are not subject to harmless error analysis." Pet App. 4a (citation omitted).

Similarly, the Federal Circuit recently concluded in Jurgens v. McKasy, 905 F.2d 382, 385 n.4 (Fed. Cir. 1990), that "Jurgens' appellate brief . . . [could] not substitute for a notice of appeal, even if it otherwise complie[d] with the requirements of Fed. R. App. P. 3 and 4." Jurgens, 905 F.2d at 385 n.4 (citing Cooper, 876 F.2d at 1196).

By contrast, two circuits have squarely held that an appellate brief can serve as a notice of appeal for purposes of Fed. R. App. P. 3(c): the Ninth Circuit in Allah v. Superior Court, 871 F.2d 887, 889 (9th Cir. 1989), and the Third Circuit in Frace v. Russell, 341 F.2d 901, 903 (3d Cir.), cert. denied, 382 U.S. 863 (1965).

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[6] The Fourth and Fifth Circuits conclude that the Eleventh Circuit decision of Florida Women's Clinic is aligned with them. This may be incorrect. In Florida Women's Clinic, both the notice of appeal and the appellate brief were filed before the entry of final judgment. Florida Women's Clinic, 706 F.2d at 1172-73. Thus, neither document could have been construed to refer to the final order of the trial court, and no other document was filed within the thirty day period following the judgment. Id. at 1173.

Although Allah was not acknowledged by the court below, its facts are indistinguishable from Smith's case. Allah filed a notice of appeal during the pendency of a post-verdict motion. Allah, 871 F.2d at 889. Shortly after the motion was decided, Allah filed his appellate brief. Id. The Ninth Circuit concluded that it would "construe Allah's opening brief . . . as a proper notice of appeal" because it "fulfilled all the purposes of a notice of appeal." Id. at 889-90. The appellate brief "was served on the other parties to the litigation," "showed Allah's intent to appeal," and was timely because it was filed within the time period required by appellate rule 4. Id. at 890. The Ninth Circuit stated that "[d]ocuments that are not denominated notices of appeal will be so treated so long as they 'clearly evince the party's intent to appeal,' are served on the other parties to the litigation, and are filed in the court within the time period otherwise provided by Rule 4(a)(4)." Id. at 889 (citations omitted).

Similarly, in Frace v. Russell, 341 F.2d 901 (3d Cir.), cert. denied, 382 U.S. 863 (1965), an inmate filed a "Brief for Appeal" and an "Affidavit in Forma Pauperis." Frace, 341 F.2d at 903. The Third Circuit "treat[ed the inmate's] 'Brief for Appeal' as a timely notice of appeal from the order of the District Court" and "as an application for a certificate of probable cause." Id.

Thus, either five or six circuits have now decided this jurisdictional issue arising under Fed. R. App. P. 3(c), and a

FILED: December 26, 1990

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECEIVED
DEC 28 1990

No. 88-7096

WILLIAM LEWIS SMITH,

Plaintiff-Appellant,

versus

JON P. GALLEY, et al.,

Defendants-Appellees.

O R D E R

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Russell and Judge Smith.

/s/ H. E. Widener, Jr.
For the Court

A True Copy, Teste:
John H. Brennan, Clerk
By Beth Calvert
Deputy Clerk

clear conflict exists. Smith's case presents this Court with an opportunity to determine the proper interpretation of Fed. R. App. P. 3(c).

2. Review is especially appropriate in this case because recent precedent of this Court suggests that the approach of the Fourth Circuit is incorrect. In Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), this Court held that a federal appellate court will not have jurisdiction over parties when they are not specified in the notice of appeal in accordance with the requirements of Fed. R. App. P. 3(c). Torres, 487 U.S. at 312, 318. Nevertheless, the Court stated that "if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." Id. at 316-17. Although this Court found that the requirement of Rule 3(c) to specifically name the parties to the appeal was jurisdictional, "[it reemphasized] the important principle . . . that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." Id. at 316.

The Fourth Circuit rule which unequivocally refuses to allow a brief to serve as the "functional equivalent" of a notice of appeal is at odds with this admonishment that technicalities should not stand in the way of deciding cases on the merits.

Smith's appeal should have been litigated on its merits because his informal brief was the "functional equivalent" of a notice of appeal. Smith's informal brief contained all of the necessary information required of a notice of appeal, was filed within thirty days of final judgment, and notified the appellees and the court of his intention to appeal. One appellee, Barry, submitted an informal brief 37 days after Smith filed his premature notice of appeal, and a supplementary brief thereafter. App. 83-107, 112-15. Furthermore, counsel for the State employees filed a motion urging "[the Fourth Circuit] to proceed with Appellant's Pro Se Appeal," stating that they "[stood] ready to defend the appeal filed in Pro Se by Appellant William Lewis Smith." App. at 132-33.

The panel's concerns that the brief was a form prepared by the clerk's office and that a lawyer who no longer represented Smith wrote him a letter telling him that the notice of appeal was invalid[7] are irrelevant. The controlling question in a "functional equivalent" analysis is whether or not the document

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[7] This letter from former counsel must have seemed odd to Smith because the Fourth Circuit and the appellees all treated the appeal as if it were valid. In any event, the "functional equivalency" test is operative whether or not a party has counsel or is charged with knowledge of Rule 4. See, e.g., Cobb v. Lewis, 488 F.2d 41, 45 (5th Cir. 1974) (adopting and applying the "functional equivalent" analysis in a case where the parties were represented by counsel); Torres, 487 U.S. at 317 (inquiring, in a case where petitioner was represented by counsel, whether petitioner filed the "functional equivalent" of a notice of appeal).

being substituted fulfills the requirements of a notice of appeal.

There are other indications that the inflexible rule in the Fourth, Fifth, and Federal Circuits is unwarranted. This Court, although specifically focusing on the requirements of appellate rule 4(a)(2), recently stated the following regarding whether a premature notice of appeal would be considered valid:

> FirsTier's confusion as to the status of the litigation at the time it filed its notice of appeal was understandable. By its February 8 notice of appeal, FirsTier clearly sought, albeit inartfully, to appeal from the judgment that in fact was entered on March 3. No unfairness to IMI results from allowing the appeal to go forward.

FirsTier Mortgage Co. v. Investors Mortgage Ins., 111 S. Ct. 648, 653 (1991).

This Court has also specifically authorized appellate courts to liberally substitute other documents for a notice of appeal when they are filed by indigent and incarcerated defendants. See Coppedge v. United States, 369 U.S. 438, 442 n.5 (1962) (citing Supreme Court and other cases for premise that a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, will be used to preserve the jurisdiction of Courts of Appeals).[8]

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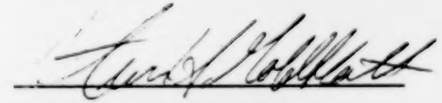
[8] The panel's analysis also ignores the cases cited in Coppedge and in the discussion in the Advisory Committee Notes to Fed. R. App. P. 3 which envision that a single document may serve two purposes. See Coppedge, 369 U.S. at 442 n.5; Fed. R. App. P. 3 advisory committee notes.

CONCLUSION

This Court should grant the Writ of Certiorari and resolve the conflict among the circuits regarding whether an appellate brief may substitute as a notice of appeal. A decision by this Court to grant certiorari will ensure uniform protection of the appellate rights of all litigants no matter where they reside. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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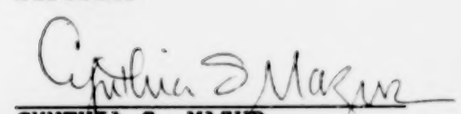
Counsel of Record
Director



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Washington, D.C. 20001-2095
(202) 662-9555

March 1991

APPENDIX

William Lewis SMITH, Plaintiff–Appellant,

v.

Jon P. GALLEY, individually and in his official capacity as Commissioner of the Division of Corrections Department of Public Safety and Correctional Services: George H. Collins, individually and in his official capacity as Warden of the Maryland Penitentiary: Commander Captain Carpenter: R. Victor. Sergeant, individually and in his official capacity as Correctional Officer of the Maryland Penitentiary; Arnold Turner, Sergeant, individually and in his official capacity as Correctional Officer of the Maryland Penitentiary; R. Hall, Officer, individually and in his official capacity as Correctional Officer of the Maryland Penitentiary; R. Brown, Officer, individually and in his official capacity as Correctional Officer of the Maryland Penitentiary; Officer Jackson, individually and in his official capacity as Correctional Officer of the Maryland Penitentiary; Officer Wilkins, individually and in his official capacity as Correctional Officer of the Maryland Penitentiary; Wayne S. Barry, as Medical Doctor of the Maryland Department of Corrections, individually and in his official capacity; Robert Ellis, as Psychologist, of the Maryland Department of Corrections, individually and in his official capacity as Doctor of the Maryland Penitentiary; Daniel Porecki, as Psychiatrist, of the Maryland Department of Corrections, individually and in his official capacity as Doctor of the Maryland Penitentiary, Defendants–Appellees.

No. 88–7096.

United States Court of Appeals, Fourth Circuit.

Argued April 3, 1990.

Decided Nov. 29, 1990.

Inmate appealed from orders of the United States District Court for the District of Maryland, Walter E. Black, Jr., J., entered in his civil rights action against prison officials. The Court of Appeals, Widener, Circuit Judge, held that informal brief filed pro se by inmate would not be allowed to substitute for notice of appeal.

Appeal dismissed.

1. Federal Courts ⇐666

Informal brief filed pro se by inmate in civil rights action against prison officials

within 30 days of order disposing of motion for judgment notwithstanding the verdict would not be allowed to substitute for notice of appeal, where informal brief was on preprinted form that clerk's office sent to inmate because he initially filed premature notice of appeal pro se, and inmate's appointed counsel had advised inmate of his failure to perfect appeal and of time remaining in which to correct his mistake. 42 U.S.C.A. § 1983; F.R.A.P.Rules 3, 3(c), 4(a)(1, 4), 28 U.S.C.A.

2. **Federal Courts** ⇐666, 893

Requirements for notice of appeal are jurisdictional and are not subject to harmless error analysis. F.R.A.P.Rules 3, 3(c), 28 U.S.C.A.

James Kress, Student Counsel, Appellate Litigation Program, Georgetown University Law Center, argued (Steven H. Goldblatt, Director, Cynthia S. Mauzur, Supervising Atty., Brian G. Holland, Student Counsel, Appellate Litigation Program, Georgetown University Law Center, on brief), Washington, D.C., for plaintiff-appellant.

Glen K. Allen, Piper & Marbury, argued (David H. Baumberger, Piper & Marbury, on brief), Baltimore, Md., for defendants-appellees.

Before RUSSELL and WIDENER, Circuit Judges, and SMITH, United States District Judge for the Eastern District of Virginia, sitting by designation.

WIDENER, Circuit Judge:

William Smith prosecutes his appeal from two adverse orders of the district court in his action under 42 U.S.C. § 1983. Because Smith did not properly perfect his appeal, we are without jurisdiction to consider the orders in question and we therefore dismiss the appeal.

William Smith, an inmate at the Maryland State Penitentiary, suffers from a psychogenic pain disorder that, although psychological in nature, causes him severe pain and prevents him from walking. After two prison psychologists decided to deny Smith the use of a wheelchair, Smith brought this action, pro se, pursuant to 42 U.S.C. § 1983 against Commissioner of Corrections Jon Galley, Warden George Collins, staff psychologists Robert Ellis and Daniel Porecki, seven correctional officers, and one private medical doctor, Wayne Barry. Smith alleged that, by denying him the use of a wheelchair, the defendants exhibited a deliberate indifference to his medical needs in violation of the eighth amendment to the Constitution.[1]

Because Dr. Barry was employed not by the state but by a private medical group, the district court dismissed the case as to Dr. Barry because he could not have acted under color of state law for purposes of section 1983.[2] The claims against the remaining defendants proceeded to a trial before a jury. At the conclusion of Smith's case, the district court directed a verdict in favor of Galley, Collins, and three of the correctional officers. The district court also directed verdicts on the deliberate indifference claim as to the remaining four correctional officers, all prison guards.[3] The jury found that the psychologists, Ellis and Porecki, were deliberately indifferent to Smith's medical needs and awarded Smith $15,000 in damages. A judgment reflecting the district court's rulings and the jury's findings was entered on February 29, 1988.

On March 4, 1988, Ellis and Porecki filed a motion for judgment notwithstanding the

1. Smith also asserted another claim by alleging that several prison guards beat him. The trial jury found in favor of the guards on the issue, and Smith does not challenge that verdict on appeal.

2. The district court relied on our decision in *Calvert v. Sharp*, 748 F.2d 861 (4th Cir.1984), *cert. denied*, 471 U.S. 1132, 105 S.Ct. 2667, 86 L.Ed.2d 283 (1985). The Supreme Court later overruled *Calvert* in *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988), which established that a private contract physician who provides medical services to state inmates may act under color of state law for purposes of section 1983.

3. Smith's excessive force claim was allowed to proceed against four of the guards. See note 1, *supra*.

verdict. On March 22, 1988, Smith, acting pro se,[4] filed a notice of appeal. The district court then entered an order on April 14, 1988, denying the psychologists' motion for judgment notwithstanding the verdict. Later, on May 4, 1988, Smith filed an informal brief in this court requesting "[a] new trial on all issues triable by Jury."

[1] Federal Rule of Appellate Procedure 4(a)(4) provides that, if any party files a timely motion for judgment notwithstanding the verdict, a notice of appeal filed before disposition of the motion is ineffective and a new notice of appeal must be filed after the order is entered disposing of the motion.[5] Therefore, Smith does not take exception to the fact that his first notice of appeal was premature and had no effect. Smith contends, however, that his informal brief, which was filed in this court within thirty days of the district court's order disposing of the psychologists' motion for judgment notwithstanding the verdict, effectively substituted for a second notice of appeal.[6] Relying on his informal brief as a notice of appeal, Smith then challenges the district court's order dated December 26, 1984, which dismissed Dr. Barry as a defendant, and that part of the district court's February 29, 1988, order which entered judgment in favor of the prison guards on the deliberate indifference claim.

The requirements for a notice of appeal are set forth in Fed.R.App.P. 3(c):

> (c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken.

To avoid technical impediments to appellate review, courts construe Rule 3(c) liberally, especially when applied to papers filed pro se by an indigent prisoner. See *Coppedge v. United States*, 369 U.S. 438, 442 n. 5, 82 S.Ct. 917, 919 n. 5, 8 L.Ed.2d 21 (1962); *Fishbaugh v. Armour & Co.*, 185 F.2d 541, 542 (4th Cir.1950), *cert. denied*, 342 U.S. 914, 72 S.Ct. 361, 96 L.Ed. 683 (1952). Thus, Rule 3 is satisfied "by any statement ... that clearly evinces the party's intent to appeal" and which "accomplishes the two basic objectives of the Rule 3 notice requirement: (1) to notify the Court of the taking of an appeal; and (2) to notify the opposing party of the taking of the appeal." *Cobb v. Lewis*, 488 F.2d 41, 45 (5th Cir.1974). Stated another way, the question we must resolve is whether Smith's informal brief is the "functional equivalent" of a notice of appeal under Rule 3(c). See *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 108 S.Ct. 2405, 2409, 101 L.Ed.2d 285 (1988).

We believe for several reasons that the rationale for allowing other documents to substitute for a notice of appeal simply does not apply to Smith's informal appellate brief filed in this case. First, Smith's informal brief is a preprinted form that the clerk's office sent to Smith because he filed his premature notice of appeal pro se. See Loc. R. 34(b). Thus, the document was not

4. Smith was represented by appointed counsel at trial and in opposing the psychologists' motion for judgment notwithstanding the verdict. Smith filed his notice of appeal without consulting his lawyer. That notice of appeal was from an order of the district court entered March 15, 1988. The only order entered on March 15, 1988, concerned an extension of time for filing a request for attorneys' fees. We do not base our decision on this error, if any, however. See note 7, *infra*.

5. Fed.R.App.P. 4(a)(4) provides in part:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); ... the time for appeal for all parties shall run from the entry of the order ... granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

6. If Smith's informal brief is treated as a notice of appeal, it was timely filed. Fed.R.App.P. 4(a)(1) provides:

> [T]he notice of appeal ... shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from.... If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

the result of Smith's intent to initiate an appeal, but was merely Smith's response to this court's "Order to Proceed on Informal Brief." There can be no doubt, however, that the papers were filed by Smith as part of the appellate process.

Second, the normal solicitude afforded to pro se litigants is greatly diminished, even if not erased, in this case. When Smith's appointed counsel, who had just concluded Smith's successful opposition to the psychologists' motion for J.N.O.V., heard that Smith had filed a notice of appeal while the motion for J.N.O.V. was pending, he notified Smith by letter dated April 11, 1988, that

> Mr. Bell has informed me that you have attempted to appeal this matter. Although you did not send me a copy of this Notice of Appeal, I am certain from the circumstances that it is premature and thus void.... The Order denying the Motion for J.N.O.V. was entered April 13, 1988. This would give you up until May 13, 1988, before you must file an appeal.

Smith's counsel correctly advised Smith of his failure to perfect his appeal, and of the time remaining in which to correct his mistake. Smith, however, did nothing, and has provided no justification for his failure to heed counsel's advice.

[2] Finally, in addressing this same issue in a case of first impression, the Fifth Circuit recently stated:

> Faced squarely with the issue, we now determine that an appellate brief will not substitute for a notice of appeal, even if it otherwise meets the requirements of Fed.Rules App.P. 3 and 4. The Federal Rules of Appellate Procedure envision the notice of appeal and the appellate brief as two separate filings. To collapse the two into one would, as the Eleventh Circuit implied, "eliminate entirely the requirement for the filing of a notice of appeal."

United States v. Cooper, 876 F.2d 1192, 1196 (5th Cir.1989) (quoting *Florida Women's Medical Clinic, Inc. v. Smith*, 706 F.2d 1172, 1173 (11th Cir.1983)). *Contra Frace v. Russell*, 341 F.2d 901 (3d Cir.), *cert. denied*, 382 U.S. 863, 86 S.Ct. 127, 15 L.Ed.2d 101 (1965). We agree with the Fifth and Eleventh Circuits and we conclude that, although we should and do afford pro se litigants latitude where warranted, we are not free to rewrite the Federal Rules of Appellate Procedure. The requirements of Rule 3 are jurisdictional and are not subject to harmless error analysis. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 and n. 3, 108 S.Ct. 2405, 2409 and n. 3, 101 L.Ed.2d 285 (1988).

Accordingly, this appeal is

DISMISSED.[7]

7. Appellees also assert that Smith's informal brief fails to comply with Fed.R.App.P. 3(c)'s command to "designate the judgment, order or part thereof appealed from." The order dismissing Dr. Barry was entered in December 1984, while the order granting judgment to the guards was entered February 29, 1988. Smith's informal brief refers to none of the appellees or the respective orders specifically, however, but merely asks for "[a] new trial on all issues triable by Jury." Even if we refer back to Smith's premature notice of appeal to help fulfill this requirement, see *Foman v. Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 229, 9 L.Ed.2d 222 (1962), that notice mistakenly identifies the district court's March 15, 1988, order, which only extended the time for filing Smith's motion for attorneys' fees. In view of our disposition, we express no opinion on this issue. See note 4 *supra*.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

November 29, 1990

TO: Glenn William Bell, Esq.
Glen Keith Allen, Esq.
David Henry Bamberger, Esq.
E. Fremont Magee, Esq.
James Kress, Esq.
Steven H. Goldblatt, Esq.

NOTICE OF JUDGMENT

Judgment was entered this date in Case Number(s): 88-7096

The Court's opinion is enclosed.

PETITION FOR REHEARING (FRAP 40)
SUGGESTION FOR REHEARING IN BANC (FRAP 35)

Filing Time A petition must be received in the Clerk's Office within 14 days after the judgment date set forth above, to be timely. If a suggestion for rehearing in banc is to be made, it must be filed at the same time and in the same document as the petition for rehearing.

Petitions received in the clerk's office after the 14th day will be denied as untimely. Motions for extension of time to file petition for rehearing, or for leave to file petition for rehearing out of time will be denied except the following: (1) applications pursuant to I.O.P. 40.2 occasioned by the need for review by the Solicitor General; or (2) affidavits that the delay resulted from death or serious illness of counsel or a family member (or of a party or family member in pro se cases). Petitions from prisoners are deemed filed when delivered to prison authorities.

You are reminded that a timely filed petition for rehearing will stay the mandate and toll the running of the time for filing a petition for a writ of certiorari, but a suggestion for rehearing in banc, filed without a petition for rehearing will accomplish neither of these.

Purpose A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

Statement of Counsel A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as

described in the above "Purpose" section. The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel.

Form — The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

BILL OF COSTS (FRAP 39)

Filing Time — A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

MANDATE (FRAP 41)

Issuance Time — The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay — A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

CRIMINAL JUSTICE ACT

CJA — Counsel appointed under the Criminal Justice Act must file their vouchers no later than 45 days after final disposition of the case. If no petition for certiorari is filed, the 45 days runs from the issuance of the mandate. If a petition for certiorari is filed, the 45 days runs from the date of filing the petition.

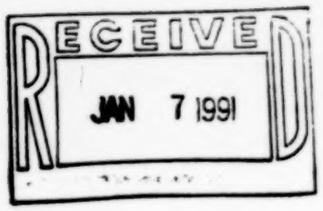
JOHN M. GREACEN
CLERK

Enclosure

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 2, 1991



No. 88-7096

Smith v. Galley

M A N D A T E

The judgment of this court dated 11/29/90 takes effect today.

JOHN M. GREACEN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

✓ FILED 5/10/88 ENTERED
LODGED RECEIVED
APR 14 1988
AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

WILLIAM LEWIS SMITH *

v. * CIVIL NO. B-83-3395

JON P. GALLEY, etc., et al. *

* * * o0o * * *

MEMORANDUM OPINION

This case was tried before a jury which, after its deliberations, returned a verdict in favor the plaintiff, William Lewis Smith, against the defendants Robert Ellis and Daniel Porecki in the amount of $15,000.00. On February 29, 1988, this Court entered judgment on the verdict. On March 4, 1988, the defendants filed a Motion for Judgment Notwithstanding the Verdict (Paper 62). The plaintiff has filed an opposition to defendants' motion (Paper 63). The Court finds that no hearing is required. See Local Rule 6(E).

At the outset, the Court finds that this case was fully tried and argued before the jury by expert counsel. The contentions made by the defendants in their post-trial motion were previously considered and rejected by the Court. The points raised by the defendants do not require that the Court enter judgment notwithstanding the verdict.

In their motion, the defendants assert the right to a verdict in their favor as a matter of law, based on the assertion that the jury could not find on the evidence

(46)

4/14/88

presented that the defendants were deliberately indifferent to the plaintiff's medical needs by the denial of a wheelchair. The Court is satisfied that on the basis of the evidence presented at the trial, the jury could weigh the evidence and judge the credibility of the witnesses, reaching a verdict in favor of the plaintiff in accordance therewith. The jury could properly conclude from the testimony of the plaintiff and his witnesses and the testimony of the defendants themselves that the defendants showed the required deliberate indifference, and this conclusion was supported by the testimony of the plaintiff's expert. Under the circumstances, the position of the defendants is without merit and the pending motion will be denied by a separate Order to be entered by the Court.

April 13, 1988

Walter E. Black, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM LEWIS SMITH *

v. * CIVIL NO. B-83-3395

JON P. GALLEY, etc., et al. *

* * * o0o * * *

O R D E R

For the reasons set forth in the aforegoing Memorandum Opinion, IT IS, this 13th day of April, 1988, by the United States District Court for the District of Maryland,

ORDERED:

(1) That defendants' Motion for Judgment Notwithstanding the Verdict (Paper 62) BE, and the same hereby IS, DENIED; and

(2) That the Clerk shall mail copies of the aforegoing Memorandum Opinion and this Order to counsel of record.

Walter E. Black, Jr.
United States District Judge

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APR 14 1988
AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FILED 3/2 ENTERED
LODGED RECEIVED

FEB 29 1988

AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

WILLIAM LEWIS SMITH :
148098

V : CIVIL ACTION NO. B-83-3395

JON P. GALLEY, etc., et al :

.....oOo.....

JUDGMENT

This action came on for trial before the Court and a jury. The plaintiff's case having been tried, and defendants having orally moved for a Directed Verdict at the conclusion of plaintiff's case-in-chief, and the Court having granted said motion as to defendants Collins, Galley, Carpenter, Hall and Turner, and granting in part and denying in part, said motion as to remaining defendants; and the jury having answered and returned the Special Verdict Form,

It is Ordered and Adjudged that Judgment be and the same hereby is ENTERED in favor of plaintiff William Lewis Smith against defendants Robert Ellis and Daniel Porecki on the claim of deliberate indifference to plaintiff's medical and psychological needs, and awarding plaintiff compensatory damages in the amount of Fifteen Thousand Dollars ($15,000), and

It is further Ordered and Adjudged that Judgment be and the same hereby is entered in favor of defendants R. Brown, Officer Jackson, Sergeant R. Victor, Officer Wilkins, Jon P. Galley, George H. Collins, Commander Captain Carpenter, Officer R. Hall, and Sergeant Arnold Turner against plaintiff William Lewis Smith.

Dated at Baltimore, Maryland this 29th day of February, 1988.

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Date
29FEB 1988

Walter E. Black, Jr.
Walter E. Black, Jr.
United States District Judge

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Date 3 MAR 1988

(61)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM LEWIS SMITH #148098 :

v. : CIVIL ACTION NO. B-83-3395

JON P. GALLEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DIVISION OF CORRECTIONS, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES; GEORGE H. COLLINS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS WARDEN OF THE MARYLAND PENITENTIARY; COMMANDER CAPTAIN CARPENTER; SERGEANT A. VICTOR, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS CORRECTIONAL OFFICERS OF THE MARYLAND PENITENTIARY; SERGEANT ARNOLD TURNER, OFFICERS R. HALL, R. BROWN, OFFICERS JACKSON AND OFFICER WILKINS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS CORRECTIONAL OFFICERS OF THE MARYLAND PENITENTIARY; WAYNE S. BARRY, AS MEDICAL DOCTOR OF THE MEDICAL DEPARTMENT OF CORRECTIONS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ROBERT ELLIS, AS PSYCHOLOGIST, AND DANIEL PORECKI AS PSYCHIATRIST, OF THE MARYLAND DEPARTMENT OF CORRECTIONS, INDIVIDUALLY, AND IN THEIR OFFICIAL CAPACITIES AS DOCTORS OF THE MARYLAND PENITENTIARY :

FILED 1/4/85

JAN 27 1988

CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

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MEMORANDUM

On September 27, 1983, the plaintiff, an inmate at the Maryland Penitentiary, filed a complaint pursuant to 42 U.S.C. § 1983 against Jon P. Galley, the Commissioner of the Division of Correction; George H. Collins, Warden of the Maryland Peniten-

tiary; seven correctional officers of the Maryland Penitentiary; Wayne S. Berry, Medical Doctor; Robert Ellis, Psychologist; and Daniel Porecki, Psychiatrist. With the exception of Barry, all defendants have seasonably responded by filing a general denial answer to the allegations contained in the complaint. See Papers No. 16, 18 and 26. Defendant Barry has moved to dismiss the complaint as against him (Paper No. 23), to which the plaintiff has responded (Papers No. 27 and 28). Defendant Barry asserts that the case against him should be dismissed as he did not act under color of state law when he provided medical services to the plaintiff and is, therefore, not subject to suit under that section. Under 42 U.S.C. § 1983, plaintiff must prove that defendant acted "under color of state law". Polk County v. Dodson, 454 U.S. 312, 315 (1981). Barry's affidavit attached to his motion to dismiss clearly shows, and it is uncontradicted by the plaintiff, that he was an employee of Chesapeake Physicians, P.A. at all pertinent times regarding this complaint. He further swears that he had no custodial of supervisory duties but acted solely in the capacity of a physician. (See Attachment to Paper No. 23). Plaintiff, in his response to defendant's motion does not discuss the question of whether or not Dr. Barry acted "under color of state law". Rather, plaintiff alleges that there was "deliberate indifference to serious medical needs" by Dr. Barry. The ruling on defendant's motion was held in abeyance pending the decision of the Fourth Circuit in the case of Calvert v. Sharp, No. 83-6569 (4th Cir. November 9, 1984). The defendant in

Calvert was also a physician employed by Chesapeake Physicians, P.A. The Fourth Circuit held that "[i]n exercising his judgment in the treatment of inmates, the private physician performs a private function traditionally filled by retained physicians. The professional obligations and functions of a private physician establish that such a physician does not act under of color of state law when providing medical services to an inmate." Id. at 6. Thus, the complaint against Dr. Barry must be dismissed.

For the reasons stated above, a separate Order will be entered dismissing the cause of action as against Dr. Barry and referring the matter to a United States Magistrate for processing and disposition as a complaint challenging conditions of confinement.

DATE: December 26, 1984

Walter E. Black, Jr.
WALTER E. BLACK, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM LEWIS SMITH #148098 :

v. : CIVIL ACTION NO. B-83-3395

JON P. GALLEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DIVISION OF CORRECTIONS, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES; GEORGE H. COLLINS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS WARDEN OF THE MARYLAND PENITENTIARY; COMMANDER CAPTAIN CARPENTER; SERGEANT A. VICTOR, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS CORRECTIONAL OFFICERS OF THE MARYLAND PENITENTIARY; SERGEANT ARNOLD TURNER, OFFICERS R. HALL, R. BROWN, OFFICERS JACKSON AND OFFICER WILKINS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS CORRECTIONAL OFFICERS OF THE MARYLAND PENITENTIARY; WAYNE S. BARRY, AS MEDICAL DOCTOR OF THE MEDICAL DEPARTMENT OF CORRECTIONS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ROBERT ELLIS, AS PSYCHOLOGIST, AND DANIEL PORECKI AS PSYCHIATRIST, OF THE MARYLAND DEPARTMENT OF CORRECTIONS, INDIVIDUALLY, AND IN THEIR OFFICIAL CAPACITIES AS DOCTORS OF THE MARYLAND PENITENTIARY :

1/4/85

::::::::::::

O R D E R

For the reasons stated in the attached Memorandum it is this 26th day of DECEMBER, 1984, by the United States District Court for the District of Maryland ORDERED:

1. That the motion to dismiss of defendant Barry

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07 JAN 1985

BE, and the same hereby IS, GRANTED.

2. That the subject action BE, and the same hereby IS, DISMISSED AS TO DEFENDANT BARRY.

3. That insofaras the remaining complaints are concerned, the matter BE, and the same hereby IS, referred to Daniel E. Klein, Jr., United States Magistrate, for processing and disposition as a complaint challenging conditions of confinement.

4. That the Clerk of the Court is directed to mail copies of this Order and foregoing Memorandum to the plaintiff and counsel for all parties.

Walter E. Black, Jr.

WALTER E. BLACK, JR.
UNITED STATES DISTRICT JUDGE

UNI D STATES COURT OF APPEALS
R THE FOURTH CIRCUIT

88-7096 Smith v. Galley
CA-83-3395-B

INFORMAL BRIEF

Directions: Answer the following questions about the appeal to the best of your ability. Use additional sheets of paper, if necessary. You need not limit your brief solely to this form but you should be certain that whatever you file answers the questions below. In any event, the court prefers short and direct statements.

1. Did the district court fail to consider important grounds for relief. If so, what grounds?

(a). Yes, The court only appointed counsel to represent the Plaintiff on his 42. U.S.C. 1983 complaint. The plaintiff had filed on July 26, 1985, "Motion For Leave To File Amended Complaint or Supplemental Complaint" into the Court seeking counsel for his serious medical problems, and requesting a Preliminary Hearing. Requesting appointment of Counsel.

(b). The Court appointed counsel and at trial The plaintiff counsel and the defendants' counsel concealed vital evidence...See attached extra sheet, 1-b.

2. Did the district court incorrectly decide the facts? If so, what facts?

It is Plaintiff contention that the Court and Jury was unable to rule fairly to the facts, and the awarding of damages in to Plaintiff, due to the facts that vital evidence (medical records, exhibits, witness, and other issues of extreme importance to my case.) was being suppressed by Plaintiff's counsel and the defendants' counsel. This suppression by both attorneys', of evidence, was done without my knowledge and against my wishes. The plaintiff had requested in his complaint to properly conduct his medical records in open court.

3. Do you think the district court applied the wrong law? If so, what law do you want applied?

I don't know.

4. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

(a). A conflict of Interest; the lawfirm of WHITEFORD, TAYLOR & PRESTON, and plaintiff's counsel are affiliated to partipants in plaintiff's previous lawsuit, which is the parties members. Thus, the plaintiff was denied his constitutional right to a fair and impartial trial for the reason that Plaintiff attorney failed to adequately and competently represent him; Also, Plaintiff was denied his constitutional right to due process and equal protection of law. Thus, the plaintiff beleave this resulted in the Court being unable to render a fair decision in my case.

5. What action do you want the Court to take in this case?

(1). A new trial on all issues triable by Jury.
(2). (a). That Plaintiff's medical records are properly conducted in the Court. (b). The Court to investigate conflict of Interest. The plaintiff beleave that there were conspiracy acts by his attorney and defendants' attorney, to suppress plaintiff medical records; thus, leaving the Court and Jury unable to render a fair decision and/or verdict in the Plaintiff Case. (c). The Plaintiff beleave that the Court should review all evidence pretaining to his case, and the award of damages which plaintiff do beleave was grossly inadequate... See attached extra sheet; 5-d.

6. If you think the Court should hear oral argument in this case, why do you think so?

Yes, the Plaintiff do beleave in all fairness to his case, and for himself, his legal counsel, and/or representative, to be allowed to hear in open Court Plaintiff's medical records, presentment of all evidence, be it physical or oral, the Plaintiff do beleave that it will give the Court and Jury a clearer vision of Plaintiff's medical condition, that his counsel and defendants counsel suppressed from the Court by ruleing out.

William Lewis Smith

Dated: April 28, 1988

Signature
NOTARY NOT REQUIRED

IMPORTANT: A COPY OF THIS BRIEF AND ANY ATTACHMENTS MUST BE SENT TO ALL PARTIES IN THE CASE. PLEASE LIST BELOW THE NAMES AND ADDRESSES OF THE PARTIES WHO WERE SENT A COPY OF YOUR BRIEF, TOGETHER WITH THE DATES ON WHICH THEY WERE SENT.

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88-7096 Smith vs. Galley, et al.
CA-83-3395-B

William Lewis Smith
ROXBURY CORRECTIONAL INSTITUTION
Route 3, Box 4444
Hagerstown, MD 21740

ATTACHED- Extra Sheet from informal brief:

Continued; 1-b ... (medical records, exhibits, witnesses, and other issues of extreme importance to the Plaintiff's case.) thus, the Plaintiff beleave that the Court and Jury was unable to render a fair verdict and/or decision in his case. This suppression of evidence was done without his knowledge and against his wishes.

Continued; 5-d ... to the suffering the Plaintiff have been subject to, and what he is still enduring. (e). That a U.S. Federal Investigation by the U.S. Justice Department and U.S. Attorney, and to take legal action against all parties who are responsible for their conspiracy to commit fraud, wrong doing, malice, etc., etc., to the Plaintiff. (f). Appellant cost of this suit. (g). Such other and futher relief as law and justice may require.

William Lewis Smith
WILLIAM LEWIS SMITH

Dated: April 28, 1988

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Page 3 of 3

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed by certification on April 28, 1988, to the following:

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WILLIAM LEWIS SMITH

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ORIGINAL

Supreme Court, U.S.
FILED
APR 19 1991
OFFICE OF THE CLERK

No. 90-7477

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

RECEIVED
HAND DELIVERED
APR 19 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

WILLIAM LEWIS SMITH,

Petitioner,

v.

RICHARD LANHAM, ET AL.

Respondents.

RESPONDENT DR. WAYNE S. BARRY'S BRIEF IN OPPOSITION TO PETITIONER WILLIAM LEWIS SMITH'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Dr. Wayne S. Barry

27 pp

QUESTION PRESENTED

Whether a Court of Appeals Should Accept an Appellate Brief as the Functional Equivalent of a Notice of Appeal, When Doing So Effectively Eliminates the Requirement of Filing a Separate Notice of Appeal?

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STATEMENT OF THE CASE

Mr. Smith's statement of the case requires supplementation or correction in several respects. First, it fails adequately to discuss two important facts. Second, it describes Dr. Barry's June 24, 1988 Supplemental Brief somewhat tendentiously. Finally, it mischaracterizes the Fourth Circuit's reasoning in Smith v. Galley.

1. Facts Not Adequately Discussed. Mr. Smith in his statement of the case makes only oblique reference to a letter he received on April 21, 1988 from Leo P. Hylan, Esquire, the court-appointed attorney who represented Smith at the jury trial before the District Court. The letter, however, provides important background to Smith's failure to comply with F.R.A.P. 4(a).

In the first two paragraphs of this April 21 letter, Mr. Hylan states:

> Dear Mr. Smith:
>
> Mr. Bell has informed me that you have attempted to appeal this matter. Although you did not send me a copy of this Notice of Appeal, I am certain from the circumstances that it is premature and thus void.
>
> I again strenuously urge you not to appeal this matter. I do not think there are any issues you will be able to prevail upon before the Fourth Circuit. The Order denying the Motion for J.N.O.V. was entered April 13, 1988. This would give you up until May 13, 1988 before you must file an appeal. I would urge you to take my advice and not file an appeal, or at least seek a second legal opinion on the matter.

This letter shows that Smith had express notice that his March 22, 1988 notice of appeal was premature and void. It shows further that he received this information in abundant time to have filed a new, effective notice of appeal. Smith did not, nonetheless, file a new notice of appeal.[1/]

Smith also gives abbreviated discussion in his statement of the case to the role played in this matter by the materials that the Fourth Circuit court clerk under Local Rule 34(b) sends to all litigants in a pro se appeal. Smith notes, correctly, that he received the preprinted form for his informal brief from the clerk in accordance with this local rule. He fails to mention, however, that accompanying this preprinted informal brief form was a document entitled "Order to Proceed on Informal Brief." This document provided detailed instructions as to filing the brief and serving it on all parties, and it set forth the addresses of all litigants, including that of Dr. Barry's counsel.[2/] Smith's receipt of these materials supports an inference that his decision to file an appellate brief, his service of this brief on Dr. Barry, and

---

1/ The letter is found in the joint appendix to the Fourth Circuit Appeal at pages 81-82.

2/ A copy of the "Order to Proceed on Informal Brief" received by Dr. Barry is attached as Exhibit 1. Presumably Mr. Smith received an identical order. This order was not included in the joint appendix. The Fourth Circuit, however, referred to the order in its opinion. See Smith v. Galley, 919 F.2d at 895-96.

the timing of his filing did not originate with him, but rather were responsive to instructions he received from the Fourth Circuit.

2. Tendentious Description of Dr. Barry's June 24, 1988 Supplemental Brief. Smith places considerable emphasis in his statement of the case on the fact that Dr. Barry asserted for the first time in his June 24, 1988 Supplemental Brief that Smith's notice of appeal was defective. The reality of the matter, however, is that when on April 28, 1988 Dr. Barry submitted his initial informal brief, the Fourth Circuit's decision in Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984), cert. denied, 471 U.S. 1132 (1985) was entirely dispositive of Smith's appeal. Dr. Barry had no reason to present additional arguments; it would have been superfluous to have done so. When on June 20, 1988, Calvert was overruled by this Court's decision in West v. Atkins, 487 U.S. 42 (1988), Dr. Barry then had reason to present the additional argument that Smith's notice of appeal was defective. This does not mean, as Smith would appear to suggest, that this argument regarding defects in the notice of appeal is merely "technical" or is lacking in merit.

3. Mischaracterization of Fourth Circuit's Opinion in Smith v. Galley. Smith's description of the Fourth Circuit's opinion in Smith v. Galley appears to imply that the court inexplicably relied on facts extraneous to appropriate

"functional equivalent" analysis. In reality, however, the "functional equivalent" determination is highly fact-specific, since it is predicated on a special solicitude for incarcerated and indigent defendants. See Coppedge v. United States, 369 U.S. 430, 442 n.5. (1962). In the present case, there were a number of different facts relevant to the "functional equivalent" determination. It was relevant that Smith received the April 21 letter from Mr. Hylan; it was relevant also that Smith filed his appellate brief in response to the Fourth Circuit's "Order to Proceed on Informal Brief." The Fourth Circuit considered these different facts and found them significant. Its reliance on these facts was in no respect logically inconsistent with "functional equivalent" analysis.

SUMMARY OF ARGUMENT IN OPPOSITION

Petitioner seeks certiorari on an extraordinarily narrow issue, i.e., whether a particular document -- an appellate brief -- falls within the "functional equivalent" exception to F.R.A.P. 3(a)'s requirement of the timely filing of a valid notice of appeal. An issue this narrow -- it could be resolved in a paragraph of discussion -- does not merit the attention of the Supreme Court. Morever, given the narrowness of this issue, the dialogue between the circuits on this point has developed slowly and is still inchoate. Hence, it would be premature for the Court to take certiorari on this issue at this time, even if the issue were otherwise worthy of certiorari. Further, there are facts unique to this case that limit its potential significance as precedent. Finally, the petitioner's contentions notwithstanding, the Fourth Circuit's decision below in this case is not in conflict with any decisions of this Court. To the contrary, the Fourth Circuit's opinion is supported by this Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988).

ARGUMENT

I. MR. SMITH SEEKS CERTIORARI ON AN EXTRAORDINARILY NARROW ISSUE

F.R.A.P. 3(a) provides that an appeal from a district court to a court of appeals "shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4 [i.e., within 30 days after entry of judgment]." The timely filing of a valid notice of appeal is a jurisdictional prerequisite. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982). Ordinarily this notice of appeal is a separate document specifying the parties taking the appeal, the judgment appealed from, and the court to which appeal is taken. See F.R.A.P. 3(c); see also Form 1 in Appendix of Forms to Appellate Rules. Over the course of several decades, however, the Supreme Court and the Court of Appeals have developed a rather narrow exception to the requirement of filing a separate notice of appeal. This exception rests generally on special concern for incarcerated and indigent defendants and applies to documents that are the "functional equivalent" of notices of appeal. See Coppedge v. United States, 369 U.S. 438, 442 n.5. (1962); Munden v. Ultra-Alaska Associates, 849 F.2d 383, 387-88 (9th Cir. 1988). A great variety of documents have been considered -- some accepted, some rejected -- as satisfying the "functional equivalent" determination. See, e.g., McMillan v. Barksdale,

823 F.2d 981, 982-83 (6th Cir. 1987) (pro se motion for certificate of probable cause accepted as functional equivalent of notice of appeal); Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987) (motion for rehearing rejected as functional equivalent of notice of appeal); Alamo Chemical Transportation Co. v. NU Overseas Valdes, 744 F.2d 22, 24 (5th Cir. 1984) (motion for enlargement of time to file appellate brief rejected as functional equivalent of notice of appeal).

Against this background, the narrowness of the question on which Smith seeks certiorari becomes apparent. Smith, in his question presented for certiorari, poses the question whether one specific document -- an appellate brief -- should be permitted to serve as the functional equivalent of a notice of appeal. The petitioner, in other words, would have the resources of the Supreme Court of the United States engaged to determine one particular application of a narrow exception to the requirements of F.R.A.P. 3(a), itself a rather limited rule. The particular question posed by Smith could be resolved in a paragraph of discussion, as it has been by the Courts of Appeal that have addressed it. Dr. Barry would submit, with respect, that an issue this narrow does not merit the attention of the highest court in the land.

II. THE DIALOGUE AMONG THE CIRCUITS ON THE NARROW ISSUE ON WHICH SMITH SEEKS CERTIORARI IS STILL UNDEVELOPED

Smith seeks certiorari on the grounds that there is conflict between certain circuit court decisions on the question of allowing an appellate brief to serve a second function as a notice of appeal. It is true that there is a limited conflict on this point, but it is also true that the dialogue between the circuits on this question has hardly developed. This is not surprising, given the narrowness of the issue.

The question appears to have first arisen in 1965, in Frace v. Russell, 341 F.2d 901 (3d Cir. 1965). The Third Circuit in that case did not discuss its decision to treat a prisoner's brief for appeal as a notice of appeal. 341 F.2d at 903. Nearly two decades later the question arose again in Florida Women's Medical Clinic, Inc. v. Smith, 706 F.2d 1172 (11th Cir. 1983). In this civil case, the Eleventh Circuit disapproved the appellant's contention that its appellate brief should be accepted as a notice of appeal. The Eleventh Circuit observed that "[a]ppellant cites no authority for the proposition that a Court may eliminate entirely the requirement for filing a notice of appeal." The Eleventh Circuit Court did not cite or discuss Frace. 706 F.2d at 1173.

Several years later, in Allah v. Superior Court, 871 F.2d 887 (9th Cir. 1989), the Ninth Circuit held that a prisoner's appellate brief "fulfilled all the purposes of a notice of appeal." 871 F.2d at 889-90. The Ninth Circuit in Allah did not cite or discuss Frace or Florida Women's Clinic.

In U.S. v. Cooper, 876 F.2d 1192 (5th Cir. 1989), the Fifth Circuit noted the conflict between Frace and Florida Women's Clinic, and held that the reasoning in Florida Women's Clinic was correct. 876 F.2d 195-96. In Jurgens v. McKasy, 905 F.2d 382 (Fed. Cir. 1990), the Federal Circuit, in a footnote in which it cited Cooper, held that an appellate brief cannot substitute for a notice of appeal. 905 F.2d at 385 n. 4. Finally, in the present case, the Fourth Circuit noted the conflict between Cooper and Florida Women's Clinic on the one hand and Frace on the other, and aligned itself with Cooper and Florida Women's Clinic. 919 F.2d at 896. Neither the Cooper, Jurgens nor present Smith decision cited or discussed the Allah decision.

As this summary of the case law indicates, the conflict, such as it is, on the issue on which Smith seeks certiorari has not generated a particularly vigorous debate. One finds, on the one hand, ipse dixit decisions by the Third and Ninth Circuits in Frace and Allah, and, on the other, a basic rationale set forth in Florida Women's Clinic that is

followed in Cooper, Smith and Jurgens. The Frace and Allah decisions articulated no rationale for their decisions to counter that set forth in Florida Women's Clinic, and consequently there has been little development of the issue. Indeed the Cooper, Smith and Jurgens decisons have not even mentioned Allah.

It is unlikely, but perhaps not impossible, that at some future time a real debate might emerge. This would be contingent on those who take the Frace-Allah position being able to conceive a rationale to counter that set forth in Florida Women's Clinic and adaoted in Cooper and Smith. If this occurred, one might be able to speak meaningfully of a "conflict" among the circuits. But that speculative state of affairs is far removed from the facts now existing. The present facts show only a smattering of decisions and an inchoate debate on an extraordinarily narrow issue. The time for guidance by the Supreme Court has not arrived, if indeed it ever will.

III. THE PRESENT CASE HAS UNIQUE FACTS LIMITING ITS SCOPE AS PRECEDENT

If this Court were inclined to take certiorari on an issue so narrow as that of whether a particular document may or may not serve as the functional equivalent of a notice of

appeal, the Court, of course, would have before it the entire case. It is, therefore, a relevant consideration that this case contains unique facts, and is consequently likely to have limited precedential import.

One fact that marks this case as sui generis concerns the April 21 letter Smith received from his attorney Hylan. Smith received this letter during the interval between the time his notice of appeal had been rendered void and the deadline for filing a new and effective notice of appeal. As the Fourth Circuit noted, this letter greatly weakens the degree of solicitude to which Smith, as a pro se appellant, can lay claim. A set of facts including such a letter is not likely to recur.

Another fact limiting the precedential scope of this case is the role played by Fourth Circuit Local Rule 34(b). As mentioned in the statement of the case, Smith's receipt of the Fourth Circuit's "Order to Proceed on Informal Briefs" pursuant to this local rule greatly weakens the inference that the decision to file the appellate brief, and to file it when he did, originated with Smith. Few other circuits, if any, have a local rule comparable to Fourth Circuit Local Rule 34(b).[3/]

3/ Counsel for Dr. Barry has looked with care through the local rules and internal operating procedures of all other circuits and not found any rule or procedure comparable to Fourth Circuit Local Rule 34(b).

Another fact marking this case as unique concerns the particular language used by Smith in his appellate brief. Even were this brief permitted to serve a dual function as a notice of appeal, it would still fail to comply with relevant requirements for notices of appeal. For though Smith asserts that this surrogate notice of appeal encompases Dr. Barry, nowhere in the brief does Smith mention Dr. Barry or the order dismissing Dr. Barry from the case. The focus of Smith's concern in this brief is an alleged collusion between his attorney and the defendants' (other than Dr. Barry) attorney. Smith's nearest approach to a reference to Dr. Barry is his request for a "new trial on all issues triable by jury." The order dismissing Dr. Barry, however, was not an issue triable by jury. The specific language of the brief thus is an important factor weighing against Smith in this matter, and, again, this particular language is not likely to be found in subsequent cases.

IV. THIS SMITH V. GALLEY OPINION IS NOT IN CONFLICT WITH SUPREME COURT PRECEDENT

Smith suggests that the Fourth Circuit's opinion in Smith v. Galley is in conflict with this Court's opinions in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) and FirsTier Mortgage Co. v. Investors Mortgage Ins., 111 S. Ct.

648 (1991). Torres, however, is precedent supporting the Fourth Circuit's decision, for in that case this Court required strict compliance with the requirements of F.R.A.P. 3. As the Court there noted, "[p]ermitting imperfect but substantial compliance with a technical requirement is not the same as waiving the requirement altogether." 487 U.S. at 316-17. Permitting an appellate brief to serve a second function as a notice of appeal in effect eliminates the requirement for filing a notice of appeal. It thus has the effect of "waiving the requirement altogether," the result disapproved in Torres.

FirsTier Mortgage focused specifically on the requirements of F.R.A.P. 4(a)(2), which provides that "a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." In that case, this Court, holding that a bench ruling granting a summary judgment motion was a "decision" within the language of Rule 4(a)(2), noted that this interpretation was entirely consonant with the intent of Rule 4(a)(2)'s drafters. 111 S. Ct. at 653. In the present case, by contrast, there is no support in the notes of the Advisory Committee on Appellate Rules for eliminating entirely the requirement of filing a notice of appeal, the result that follows from permitting an appellate brief to serve a double function as a notice of appeal.

CONCLUSION

For the reasons stated and upon the authorities set forth herein, Mr. Smith's petition for a writ of certiorari should not be granted.

Respectfully submitted,

David H Bamberger

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*Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-7096

Smith v. Galley

FILED
APR 13 1988
U.S. Court of Appeals
Fourth Circuit

ORDER TO PROCEED ON INFORMAL BRIEF

This appeal having been filed in this Court and it appearing that at least one party is proceeding without counsel, IT IS ORDERED:

1. The case shall be submitted on the lower court record and, at the election of the parties, on informal briefs, the form for which is attached. Parties may, but need not, cite statutes and legal authority to support their contentions. Only the basic facts and issues need be set forth, as requested on the form. If a supporting memorandum is essential to address the issues adequately, it may attached to the briefing form.

The Court will review the entire record on appeal for possible meritorious issues; it will not limit its review solely to the issues raised in the parties' briefs.

2. The six-digit docket number appearing on the first page of this order shall be placed prominently on every paper filed by any party to this appeal, as well as on all correspondence addressed to the Court.

3. Parties electing to submit informal briefs shall mail their briefs to the Court, with copies to all parties, NO LATER THAN May 4, 1988 .

4. The original and one copy of the parties' briefs shall be mailed to the Court, with first class postage pre-paid and affixed, addressed as follows:

United States Court of Appeals
for the Fourth Circuit
United States Courthouse
10th and Main Streets
Richmond, VA 23219

5. Every document mailed to the Court by any party must bear a notation that a complete copy thereof was mailed to all other parties at the same time; the Court must receive the original and one copy of every such document. The notation must show the complete name and mailing address of the persons to whom the copies were sent and the date of mailing.

6. Extensions of briefing deadlines are not favored by the Court and are granted only for good cause stated in writing. Requests for extensions MUST BE RECEIVED BY THE COURT BEFORE THE EXPIRATION OF THE DEADLINE.

7. Transcript of trial proceedings WILL NOT be prepared at government expense except in those limited cases in which the Court concludes from the briefs, the claims of the parties, and the record that the appeal presents a substantial question that cannot be determined without a transcript.

8. The Court will not appoint counsel or schedule an appeal for oral argument unless it concludes, after having reviewed the case, that the appeal cannot be decided on the basis of the informal briefs and the record. Therefore, it is unnecessary to request the appointment of counsel or oral argument.

9. Appellants may, but need not, file a docketing statement within 10 days of filing of the notice of appeal. The form and instructions should already have been provided to appellant by the district court.

JOHN M. GREACEN
CLERK

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Loc. R. 34(a) Oral Argument; pre-argument review and summary disposition of appeals; statement regarding the need for oral argument.

In the interest of docket control and to expedite the final disposition of pending cases, the chief judge may designate a panel or panels to review any pending case at any time before argument for disposition under this rule.

In reviewing pending cases before argument, the panel will utilize the minimum standards set forth in FRAP 34(a). If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument is not to be allowed, they may make any appropriate disposition, without oral argument, including but not limited to, affirmance or reversal.

In furtherance of the disposition of pending cases under this rule, any party may include in his brief at the conclusion of the argument section a statement setting forth the reasons why, in his opinion oral argument should be heard.

Loc. R. 34(b) Informal Briefs

Whenever an application for a certificate of probable cause from the denial of a writ of habeas corpus or an appeal taken from the denial of a motion under 28 U.S.C. 2255, or any pro se appeal shall be filed, the Clerk shall notify the appellant that he may file within twenty-one days after receipt of such notice, an informal brief, describing the grounds upon which he claims he is entitled to relief and setting forth the merits of his appeal. Any such informal brief filed by any party shall be considered, together with the record and other relevant papers, by the panel to which the proceeding has been referred.

Parties proceeding pursuant to this section shall be provided copies of this local rule by the clerk.

U T STATES COURT OF APPEALS
R THE FOURTH CIRCUIT

88-7096 Smith v. Galley
CA-83-3395-B

INFORMAL BRIEF

Directions: Answer the following questions about the appeal to the best of your ability. Use additional sheets of paper, if necessary. You need not limit your brief solely to this form but you should be certain that whatever you file answers the questions below. In any event, the court prefers short and direct statements.

1. Did the district court fail to consider important grounds for relief. If so, what grounds?

2. Did the district court incorrectly decide the facts? If so, what facts?

3. Do you think the district court applied the wrong law? If so, what law do you want applied?

BEST AVAILABLE COPY

4. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

5. What action do you want the Court to take in this case?

6. If you think the Court should hear oral argument in this case, why do you think so?

Signature
NOTARY NOT REQUIRED

IMPORTANT: A COPY OF THIS BRIEF AND ANY ATTACHMENTS MUST BE SENT TO ALL PARTIES IN THE CASE. PLEASE LIST BELOW THE NAMES AND ADDRESSES OF THE PARTIES WHO WERE SENT A COPY OF YOUR BRIEF, TOGETHER WITH THE DATES ON WHICH THEY WERE SENT.

CERTIFICATE OF SERVICE

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. 90-7477

WILLIAM LEWIS SMITH,

Petitioner,

v.

RICHARD LANHAM, ET AL.

Respondents.

RESPONDENT DR. WAYNE S. BARRY'S
BRIEF IN OPPOSITION TO PETITIONER
WILLIAM LEWIS SMITH'S PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

I HEREBY CERTIFY that on April 19, 1991, two (2) copies of the foregoing Pleading were sent, postage prepaid, to each of the following:

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April 19, 1991

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Mr. Coleman Williams, Clerk
Supreme Court of the United States
Supreme Court Building
1 First Street, N.E.
Washington, D.C. 20543

Smith v. Lanham
No. 90-7477

Dear Mr. Williams:

Please accept for filing Respondent Dr. Wayne S. Barry's brief in opposition to Petitioner William Lewis Smith's petition for a writ of certiorari. As the attached motion for leave to proceed in forma pauperis indicates, Mr. Smith is proceeding in forma pauperis. Hence, in accordance with Supreme Court Rule 15.2, we, as Respondent, are filing twelve typewritten copies of our opposition brief.

Sincerely,

Glen K. Allen

Glen K. Allen

GKA:ld
ENclosure

ORIGINAL

No. 90-7477

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

WILLIAM LEWIS SMITH,

Petitioner

v.

RICHARD LANHAM, ET AL.

Respondents

RESPONDENTS VICTOR, TURNER, HALL, BROWN JACKSON AND WILKINS' BRIEF IN OPPOSITION TO PETITIONER WILLIAM LEWIS SMITH'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Wilkins

QUESTION PRESENTED

Whether an informal appellate brief filed pursuant to Local Rule 34(b) of the United States Court of Appeals for the Fourth Circuit satisfies the requirement of a Notice of Appeal as set forth in Federal Rule of Appellate Procedure 3(c)?

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No. 90-7477

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

WILLIAM LEWIS SMITH,

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RESPONDENTS VICTOR, TURNER, HALL, BROWN JACKSON AND WILKINS' BRIEF IN OPPOSITION TO PETITIONER WILLIAM LEWIS SMITH'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

Correctional Officers Sergeants R. Victor and Arnold Turner and Corporals R. Hall, R. Brown, Jackson and Wilkins,[1] accept Mr. Smith's Statement of the Case as supplemented and corrected by Dr. Barry's Statement of the Case filed in his Respondent's brief.

---

[1] These Correctional Officers are the parties submitted as parties to this Court by Mr. Smith in his petition before this Court. In this Court's May 7, 1991 letter to counsel, and in Smith's Petition, the caption of the case appears as William L. Smith v. Lanham, Comm'r., et al.. Nowhere in this case does Mr. Lanham appear as a party. He is presently the Commissioner of the Division of Correction but at the time of the incident Jon P. Galley was the Commissioner of the Division of Correction and a named party in the court below. Mr. Smith now appears to have released Mr. Galley, Mr. Collins, Mr. Carpenter, and Drs. Ellis and Porecki from any further proceedings in this matter.

REASONS FOR DENYING THE WRIT

I. Introduction.

Petitioner presents no substantial reasons why this Honorable Court should grant a Writ of Certiorari. Because the Fourth Circuit correctly resolved the matter and because the specific facts relating to the appellate procedure do not make this an appropriate case for this Court's consideration, further review is unwarranted.

II. This Court's analysis of the requirements of the Federal Rules of Appellate Procedure 3 and 4.

This Court recently addressed the requirements of Federal Rule of Appellate Procedure 3(c) in Torres v. Oakland Scavenger Company, 487 U.S. 312, 108 S.Ct. 2405 (1988). Federal Rule of Appellate Procedure 3 provides in relevant part:

> Rule 3. **Appeal as of Right - How Taken.**
>
> (a) **Filing the Notice of Appeal.** An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . .
>
> * * * *
>
> (c) **Content of the Notice of Appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. . . .

Torres holds that where a Petitioner does not file a Notice of Appeal and thus fails to comply with the specificity requirements of Rule 3(c), such failure presents a jurisdictional bar to the appeal. Id. at 2409.

Mr. Smith contends that the 1979 amendment to Rule 3(c) which added that an appeal "shall not be dismissed for informality of form or title of the notice of appeal", justifies his position that the court should accept the informal brief as the "functional equivalent" of a notice of appeal. Reliance for this position is also cited as Foman v. Davis, 371 U.S. 178 (1972). Reversing the appellate court's refusal to hear the appeal in Foman, this Court established an important principle that the requirements of the Federal Rules of Procedure should be liberally construed and that "mere technicalities" should not stand in the way of consideration of a case on its merits. Id. at 181. In Foman, a wholly separate provision of Rule 3(c) was addressed which required that any notice of appeal designate the judgment and the order or part thereof appealed from.

However, as this Court stated in Torres, "[p]ermitting imperfect but substantial compliance with a technical requirement is not the same as waiving the requirement altogether as a jurisdictional threshhold." Id. at 2408. Rules 3 and 4 combine to require that a notice of appeal be filed with the Clerk of the District Court within the time prescribed for taking such an appeal. In United States v. Robinson, 361 U.S. 220 (1960), this Court reasoned that because the timely filing of a notice of

appeal is mandatory and jurisdictional, that compliance with the provisions of these rules is of the utmost importance. As stated in Torres:

> [A]lthough a court may construe the rules liberally in determining whether they have been complied with, it may not waive the jurisdictional requirement of Rules 3 and 4 even for "good cause shown" under Rule 2 if it finds that they have not been met.

Torres, 108 S.Ct. at 2409.

Mr. Smith places substantial reliance on the "functional equivalent" language set forth in Torres. However, what is contemplated under this Court's functional equivalent analysis is that the court not resort to mere technicalities to deny the appeal. See also Foman v. Davis, supra. The Fifth Circuit followed this reasoning in Fischer v. United States Dep't. of Justice, 759 F.2d 461, 464 (5th Cir. 1985), where it ruled that the "motion for leave to proceed in forma pauperis" is the substantial equivalent of a notice of appeal and is effective to invoke appellate jurisdiction. This Court also recognized cases where a letter from a prisoner to a judge suffices as a notice of appeal. See Torres, 108 S.Ct. at 2408, n.2. The Sixth Circuit found that a pro se motion for a certificate of probable cause is the functional equivalent of a notice of appeal. McMillian v. Barksdale, 823 F.2d 981 (6th Cir. 1987).

In the instant case, Smith, while acting pro se, filed his notice of appeal on March 22, 1988, after a Motion for Judgment Notwithstanding the Verdict had been filed but not yet ruled upon. In his notice of appeal he designated that his appeal was from an Order of the District Court entered on March 15, 1988,

which in fact only referred to a granting of an extension of time for his attorneys to file a Request for Attorneys' Fees and not the actual judgment that was entered on February 29, 1988. But for the Motion for Judgment Notwithstanding the Verdict, Smith's notice of appeal filed on March 22, 1988 was both timely filed and would be considered to be in substantial compliance (or the functional equivalent) to satisfying the requirements of Rule 3(c) despite the error in reference to the wrong order. This is an example of the liberal construction encouraged in Foman and Torres.

Permitting such liberal construction is a far cry from the expansive reading that Smith now urges upon this Court in this case. Smith requests this Court to rewrite the appellate rules in order to accept an informal brief as the equivalent of a notice of appeal. In other words, Mr. Smith's position would essentially waive either the notice of appeal requirement altogether or eliminate the requirement of filing a separate informal brief in accordance with Rule 31(c). The Federal Rules of Appellate Procedure set forth certain requirements that litigants must follow in pressing their appeals. Failure to comply with such rules, such as filing a brief, may result in dismissal of the appeal for failure to prosecute. Julien v. Zeringue, 864 F.2d 1572, 1574 (Fed. Cir. 1989).

Collapsing two formal stages of appellate procedure into one clearly goes beyond any legislative intent of the Rules. Justice Scalia states in his concurring opinion in Torres "[b]y definition all rules of procedure are technicalities; sanction

for failure to comply with them always prevents the court from deciding where justice lies in the particular case, on the theory that securing a fair and orderly process enables more justice to be done in the totality of cases." Torres, 108 S.Ct. at 2410.

III. Various Circuit Court Analysis on Whether an Appellate Brief Satisfies the Notice of Appeal Requirement Set Forth in Rule 3(c).

The question of whether an appellate brief satisfies the notice of appeal requirement as set forth in Rule 3(c) was first addressed in 1965 in Frace v. Russell, 341 F.2d 901 (3rd Cir. 1965). In an extremely summary fashion, the Third Circuit treated a prisoner's "Brief for Appeal" both as a common notice of appeal and as an application for certificate of probable cause. The court presented no reasoned approach but rather provided an expeditious handling of a jurisdictional matter in order to affirm the case on the merits, ruling that petitioner failed to exhaust his available state remedies.

In 1989 the Ninth Circuit construed Allah's "opening brief" as a notice of appeal. Allah v. Superior Court of the State of California, 871 F.2d 887 (9th Cir. 1989). The Ninth Circuit went to great lengths to discuss that there was no separate document for the entry of judgment and therefore the brief could be filed essentially at any time. The Ninth Circuit focused on the fact that the appellate brief "fulfilled all the purposes of the notice of appeal" 871 F.2d at 889-90, but failed to consider that such reasoning would collapse two stages of appellate procedure into one. Furthermore, the Ninth Circuit neither referred to the

Frace decision nor distinguished the ruling from the Eleventh Circuit decision in Florida Women's Medical Clinic, Inc. v. Smith, 706 F.2d 1172 (11th Cir. 1983), infra.

In Florida Women's Medical Clinic, Inc. v. Smith, the Eleventh Circuit stated:

> Appellant contends that it actually filed a notice of appeal in a timely manner, because its brief, subsequently filed, set forth all the facts which normally would be contained in a notice of appeal. Appellant cites no authority for the proposition that a court may eliminate entirely the requirement for the filing of a notice of appeal.

Id. at 1173. Similarly, in United States v. Cooper, 876 F.2d 1192 (5th Cir. 1989), the first case which presented a reasoned analysis and discussed the earlier cases, the Fifth Circuit addressed the question before this Court. It recognized the conflict between Frace and Florida Women's Clinic, holding:

> Faced squarely with the issue, we now determine that an appellate brief will not substitute for a notice of appeal, even if it otherwise meets the requirements of Fed. Rules App. P. 3 and 4. The Federal Rules of Appellate Procedure envision the notice of appeal and appellate briefs as two separate filings. To collapse the two into one would, as the Eleventh Circuit implied, "eliminate entirely the requirement of the filing of the notice of appeal." (Citation omitted)

Id. at 1196. Cooper is cited in a 1990 Federal Circuit case in a footnote wherein the court held that the appellate brief cannot substitute for a notice of appeal. Jurgens v. Makasy, 905 F.2d 382 (Fed. Cir. 1990).

In sum, the Fourth Circuit joins the Fifth, the Eleventh and the Federal Circuits in finding that an appellate brief cannot substitute for a notice of appeal. The Third Circuit in a 1965

decision and the Ninth Circuit in a 1989 decision, neither of which discusses any conflicting cases nor present any real analysis as to rationale behind their holding, hold to the contrary.

IV. The Underlying Facts Surrounding Mr. Smith's Attempt to File His Notice of Appeal Further Underscore that Further Review by this Court is Unwarranted

As the Fourth Circuit stated, "the normal solicitude afforded to pro se litigants is greatly diminished, even if not erased, in this case." Smith v. Galley, 919 F.2d 893, 896 (4th Cir. 1991). Smith's counsel, who had been appointed to represent Smith in the district court, informed Smith in a letter dated April 21, 1988 that Smith must file an appeal on or before May 13, 1988 to effect a timely notice of appeal since the order denying the Motion for Judgment Notwithstanding the Verdict was not entered until April 13, 1988. Smith never followed this advice nor provided any justification for his failure to do so. Such failure should not be rewarded; the facts are simply not appropriate for review by this Court.

CONCLUSION

Petitioner presents no valid reasons why this Honorable Court should grant the Petition for Writ of Certiorari. Because the court below correctly examined the Federal Rules of Appellate Procedure 3 and 4 and found that the Rules envisioned that a notice of appeal and appellate brief constituted two stages of the appellate procedure and because Mr. Smith was dutifully

informed that he still needed to file a timely notice of appeal, further review by this Honorable Court is unwarranted.

Respectfully submitted,

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RICHARD KASTENDIECK
Assistant Attorney General

Attorneys for Respondents
Sergeants R. Victor and Arnold
Turner and Correctional Officers
R. Hall, R. Brown, Jackson and
Wilkins

A/CLA/Smith-Br

WILLIAM LEWIS SMITH,	*	IN THE
Petitioner	*	SUPREME COURT
v.	*	OF THE UNITED STATES
RICHARD LANHAM, ET AL.	*	October Term, 1990
Respondents	*	No. 90-7477

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* * * * * * * * * * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of June, 1991, Respondents Victor, Turner, Hall, Brown, Jackson and Wilkins' Brief in Opposition to Petitioner William Lewis Smith's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in the above-captioned case was mailed, postage prepaid to the Court, and two copies thereof were mailed, postage prepaid, to: Steven H. Goldblatt and Cynthia S. Mazur, Appellate Litigation Clinical Program, Georgetown University Law Center, 111 "F" Street, N.W., Washington, D.C. 20001-2095, Counsel for Petitioner, and to David H. Bamberger and Glenn K. Allen, Piper and Marbury, Charles Center South, 36 South Charles Street, Baltimore, Maryland 21201, Counsel for Respondent Dr. Wayne S. Barry.

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Wilkins

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No. 90-7477

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WILLIAM LEWIS SMITH,
Petitioner,

v.

RICHARD LANHAM, Commissioner, Maryland Department of Public Safety and Correctional Services, Division of Correction, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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McMillan v. Barksdale, 823 F.2d 981 (6th Cir. 1987)	3
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

1. Respondent Barry asserts that accepting an appellate brief as the functional equivalent of a notice of appeal "effectively eliminates" the requirement for filing a notice of appeal. See Br. in Opp. i, 8, 13. This assertion overstates petitioner's argument. Circuits that allow appellate briefs to substitute for a notice of appeal do so only if the brief serves the purposes of the notice of appeal and has been filed within thirty days of the entry of final judgment. Allah v. Superior Court, 871 F.2d 887 (9th Cir. 1989); Frace v. Russell, 341 F.2d 901 (3d Cir.), cert.

denied, 382 U.S. 863 (1965).[1] A court determines that an appellate brief is the functional equivalent of a notice of appeal only if the purposes of Fed. R. App. P. 3 have been fulfilled. The only thing that is eliminated by the application of the functional equivalent analysis is the windfall that the respondents received when this appeal was dismissed on jurisdictional grounds.

2. Barry acknowledges that the courts of appeals that have addressed this issue are in conflict. Br. in Opp. 8-10. He claims however that the issue is too narrow to "merit the attention of the Supreme Court." Br. in Opp. 5. Petitioner urges the Court to conclude otherwise. A jurisdictional issue arising under the Federal Rules of Appellate Procedure is necessarily an issue of considerable significance to this Court. See, e.g., Torres v. Oakland Scavenger Co., 487 U.S. 312, 314 (1988) (we are "grant[ing] certiorari to resolve a conflict in the Circuits over whether a failure to file a notice of appeal in accordance with the specificity requirement of Federal Rule of

[1] As stated in the Petition for Certiorari, it is not clear whether or not the Eleventh Circuit will allow an appellate brief to substitute as a notice of appeal. Pet. App. 11 n.6. Barry's heavy reliance on the Eleventh Circuit language that applying a functional equivalent test "effectively eliminates the requirement of filing a separate notice of appeal" is misplaced. See Br. in Opp. i, 8, 13. The Eleventh Circuit was referring to a situation where both the notice of appeal and the appellate brief were filed before the district court entered its final judgment. See Florida Women's Medical Clinic, Inc. v. Smith, 706 F.2d 1172, 1172-73 (11th Cir. 1983). In such a situation, no document had been filed within the requisite thirty day period; thus, the circuit court held that to allow the appeal to go forward would eliminate the requirement for a notice of appeal altogether.

Appellate Procedure 3(c) presents a jurisdictional bar to the appeal"); see also Houston v. Lack, 487 U.S. 266 (1988). This is especially true given this Court's statutory responsibility to formulate and put the appellate rules in force. See 28 U.S.C. § 2072 (1988); Schlagenhauf v. Holder, 379 U.S. 104, 112 (1964). The very right to have an appeal heard should not fortuitously hinge upon where the appellant files his appeal. In two Circuits, Smith's appeal could be considered on the merits but in three others, including the Fourth Circuit, the very same appeal must be dismissed for lack of jurisdiction. A conflict such as this is very much worthy of this Court's review.

3. Barry also argues that it is premature for this Court to consider this issue. Br. in Opp. 5-7. Were the court below the first or second court to address the issue, the point might have some persuasiveness but at least five circuits have now had the occasion to consider the issue and there is no reason to delay a decision from this Court.[2]

4. Respondent also claims that the decision below is based on

[2] In petitioner's view, the categorical approach that appellate pleadings should never be allowed to serve a double function as a notice of appeal is in conflict with at least one decision from this Court as well as other circuit decisions. See Coppedge v. United States, 369 U.S. 438, 442 n.5 (1962) (citing Tillman v. United States, 268 F.2d 422 (5th Cir. 1959) (application to proceed in forma pauperis accepted as a notice of appeal); West v. United States, 222 F.2d 774 (D.C. Cir. 1954) (motion to proceed in forma pauperis accepted as a notice of appeal); O'Neal v. United States, 272 F.2d 412 (5th Cir. 1959) (appeal bond accepted as a notice of appeal)). Respondent cites a recent Sixth Circuit case where the court of appeals accepted a motion for a certificate of probable cause as the functional equivalent of a notice of appeal. Br. in Opp. 6-7 (citing McMillan v. Barksdale, 823 F.2d 981, 982-83 (6th Cir. 1987)).

unique facts which make it an inappropriate vehicle to resolve the circuit conflict that exists. Br. in Opp. 5, 10-12. This is incorrect. The court below did express concern that Smith's brief was filed at its request and that Smith had received advice from his former attorney that the appeal was premature. Pet. App. 3a-4a. The court below, however, decided the jurisdictional issue before it without relying on these factors. The court adopted the Fifth Circuit approach and unequivocally ruled that an appellate brief can never substitute as a notice of appeal in the Fourth Circuit. Pet. App. 4a ("an appellate brief will not substitute for a notice of appeal, even if it otherwise meets the requirements of Fed. Rules App. P. 3 and 4"). Thus, the factors that respondent suggests are "unique" to this case were ultimately irrelevant to the decision below.[3]

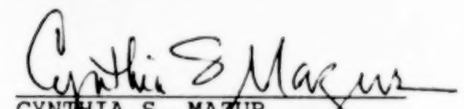
[3] The focus of the functional equivalent test is the document in question and its effect on the appellees and the court, not the degree of negligence of the appellant. Ironically, existing precedent suggests that the Fourth Circuit would have erred had it based its jurisdictional decision on whether or not the appellant had counsel or was otherwise charged with knowledge of the need to file a new notice of appeal. See Torres, 487 U.S. at 313 (omission of party's name from the notice of appeal was due to error by secretary employed by petitioner's attorney); Alamo Chem. Transp. Co. v. M/V Overseas Valdes, 744 F.2d 22, 23 (5th Cir. 1984) (applying a functional equivalent test to papers filed by counsel), cited in Br. in Opp. 7.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STEVEN H. GOLDBLATT
Attorney For Petitioner
Counsel of Record
Director



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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

I HEREBY CERTIFY that on April 24, 1991, two (2) copies of the foregoing Reply Memorandum for Petitioner were sent, postage prepaid, to each of the following:

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STEVEN H. GOLDBLATT

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-7477

WILLIAM LEWIS SMITH,
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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 39 of the Supreme Court, the petitioner, William Lewis Smith, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit without prepayment of costs.

Undersigned counsel was appointed to represent Petitioner in the United States Court of Appeals for the Fourth Circuit.

The petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

STEVEN H. GOLDBLATT
Attorney for Petitioner
Counsel of Record

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IN THE SUPREME COURT OF THE UNITED STATES

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v.

JON P. GALLEY, ET AL.
Respondents.

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

I, William Lewis Smith, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress. I sought and received from the United States Court of Appeals for the Fourth Circuit leave to proceed in forma pauperis.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? ✓ Yes ___ No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

[redacted] I receive $ 27.00 monthly, and I work at the Roxbury Correctional Institution in Hagerstown, Maryland. 21746. I am also an inmate at the prison

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other income? ____ Yes ___✓___ No

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

____ Yes ___✓___ No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing?) ____ Yes ___✓___ No

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

SUBSCRIBED AND SWORN TO before me on this 25th day of February 1991.

X William L. Smith
William Lewis Smith

Donna Hayes
Donna Hayes, Notary
My Commission Expires: 1-1-93

Supreme Court, U.S.
FILED
JUL 23 1991
OFFICE OF THE CLERK

No. 90-7477

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM LEWIS SMITH,
Petitioner,

v.

WAYNE S. BARRY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

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* Counsel of Record

PETITION FOR WRIT OF CERTIORARI FILED MARCH 22, 1991
CERTIORARI GRANTED JUNE 28, 1991

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Entry
09.27.83	Complaint filed.
10.07.83	Order (Black J.) (dated Sept. 23, 1983) permitting plaintiff to proceed *in forma pauperis*.
10.18.85	Order (Klein, U.S. Magistrate) appointing [counsel] for plaintiff.
01.04.85	Order (Black, J.) (dated Dec. 26, 1984) "GRANTING" Motion of Defendant *Barry* to Dismiss; "DISMISSING" Case as to said Defendant; and "REFERRING" Remainder of case to U.S. Magistrate (Klein) for processing and disposition as therein set forth.
02.22.88	Jury trial—FIRST DAY.
02.24.88	Oral Motion of Defendants for Directed Verdict made at the conclusion of plaintiff's case-in-chief—"GRANTED" as to Defendants *Collins, Galley, Carpenter, Hall,* and *Turner.* "GRANTED" in part and "DENIED" in part as to remaining defendants.
02.25.88	Renewed oral motion of Defendants for Directed Verdict made at the conclusion of all evidence—"DENIED."
02.25.88	*VERDICT*: In favor of Plaintiff against Defendants ELLIS and PORECKI on the claim of deliberate indifference to his medical and psychological needs; and in favor of Defendants BROWN, JACKSON, VICTOR, and WILKENS against Plaintiff on the claim for use of excessive force; and awarding Plaintiff compensatory damages in the amount of Fifteen Thousand Dollars ($15,000) as to his claim of deliberate indifference to his medical and psychological needs.

Date	Entry
02.29.88	JUDGMENT (Black, J.) "ENTERED" In favor of Plaintiff WILLIAM LEWIS SMITH against Defendants ROBERT ELLIS and DANIEL PORECKI on the claim of Deliberate indifference to plaintiff's medical and psychological needs, and awarding plaintiff compensatory damages in the amount of fifteen thousand dollars ($15,000.00) and "ENTERING" Judgment in favor of defendant R. BROWN, OFFICER JACKSON, SERGEANT R. VICTOR, OFFICER WILKINS, JON P. GALLEY, GEORGE H. COLLINS, COMMANDER CAPTAIN CARPENTER, OFFICER R. HALL AND SERVEANT (sic) ARNOLD TURNER against plaintiff WILLIAM LEWIS SMITH.
03.04.88	Motion of Defendants Ellis and Porecki for Judgment Nothwithstanding the Verdict and Memorandum.
03.15.88	Motion and Order (Black, J.) dated 3/14/88, that the time for filing Motion for Attorney's fees is extended to 20 days after the court's ruling on the pending motion for judgment notwithstanding the verdict.
03.22.88	Notice of Appeal of Plaintiff.
04.13.88	Motion for Judgment Notwithstanding the Verdict is denied. Memorandum opinion filed April 14, 1988.
04.13.88	Informal briefing order filed [by Court of Appeals]. [briefs] due: 05/04/88.
04.28.88	Informal brief filed by Appellee [Barry].
05.04.88	Informal brief filed by Smith.
05.12.88	Notice of appeal filed by Defendants Galley, Collins, Carpenter, Victor, Turner, Hall, Brown, Jackson, Wilkins, Ellis, and Porecki. [USCA Dkt. No. 88-07169]

Date	Entry
06.24.88	Supplemental informal brief dated: 06/24/88 filed by Appellee [Barry].
07.20.88	Supplemental informal brief dated: 07/20/88 filed by Smith.
11.07.88	Order entered pursuant to Fed. R. App. P. 42(b) dismissing appeal No. 88-07169 [filed by Defendants Galley, Collins, Carpenter, Victor, Turner, Hall, Brown, Jackson, Wilkins, Ellis, and Porecki] by agreement of the parties.
08.02.89	Clerk order filed assigning Steven H. Goldblatt as counsel for Smith. Briefing order filed.
11.29.90	Judgment order and published opinion filed by Court of Appeals.
12.26.90	COURT [of Appeals] ORDER filed denying motion for rehearing, denying motion for [sic] suggestion for reh[earing] in banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. B-83-3395

WILLIAM LEWIS SMITH #148098

v.

JON P. GALLEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DIVISION OF CORRECTIONS, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES; GEORGE H. COLLINS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS WARDEN OF THE MARYLAND PENITENTIARY; COMMANDER CAPTAIN CARPENTER; SERGEANT A. VICTOR, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS CORRECTIONAL OFFICERS OF THE MARYLAND PENITENTIARY; SERGEANT ARNOLD TURNER, OFFICERS R. HALL, R. BROWN, OFFICERS JACKSON AND OFFICER WILKINS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS CORRECTIONAL OFFICERS OF THE MARYLAND PENITENTIARY; WAYNE S. BARRY, AS MEDICAL DOCTOR OF THE MEDICAL DEPARTMENT OF CORRECTIONS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ROBERT ELLIS, AS PSYCHOLOGIST, AND DANIEL PORECKI AS PSYCHIATRIST, OF THE MARYLAND DEPARTMENT OF CORRECTIONS, INDIVIDUALLY, AND IN THEIR OFFICIAL CAPACITIES AS DOCTORS OF THE MARYLAND PENITENTIARY

MEMORANDUM

[Filed 1/4/85]

On September 27, 1983, the plaintiff, an inmate at the Maryland Penitentiary, filed a complaint pursuant to 42 U.S.C. § 1983 against Jon P. Galley, the Commissioner of the Division of Correction; George H. Collins, Warden of the Maryland Penitentiary; seven correctional officers of the Maryland Penitentiary; Wayne S. Berry, Medical Doctor; Robert Ellis, Psychologist; and Daniel Porecki, Psychiatrist. With the exception of Barry, all defendants have seasonably responded by filing a general denial answer to the allegations contained in the complaint. *See* Papers No. 16, 18 and 26. Defendant Barry has moved to dismiss the complaint as against him (Paper No. 23), to which the plaintiff has responded (Papers No. 27 and 28). Defendant Barry asserts that the case against him should be dismissed as he did not act under color of state law when he provided medical services to the plaintiff and is, therefore, not subject to suit under that section. Under 42 U.S.C. § 1983, plaintiff must prove that defendant acted "under color of state law". *Polk County v. Dodson*, 454 U.S. 312, 315 (1981). Barry's affidavit attached to his motion to dismiss clearly shows, and it is uncontradicted by the plaintiff, that he was an employee of Chesapeake Physicians, P.A. at all pertinent times regarding this complaint. He further swears that he had no custodial or supervisory duties but acted solely in the capacity of a physician. (*See* Attachment to Paper No. 23). Plaintiff, in his response to defendant's motion does not discuss the question of whether or not Dr. Barry acted "under color of state law". Rather, plaintiff alleges that there was "deliberate indifference to serious medical needs" by Dr. Barry. The ruling on defendant's motion was held in abeyance pending the decision of the Fourth Circuit in the case of *Calvert v. Sharp*, No. 83-6569 (4th Cir. November 9, 1984). The defendant in *Calvert* was also a physician employed by Chesapeake Physicians, P.A. The Fourth Circuit held that "[i]n exercising his judgment in the treatment of inmates, the private physician performs a private function traditionally filled by re-

tained physicians. The professional obligations and functions of a private physician establish that such a physician does not act under of color of state law when providing medical services to an inmate." *Id.* at 6. Thus, the complaint against Dr. Barry must be dismissed.

For the reasons stated above, a separate Order will be entered dismissing the cause of action as against Dr. Barry and referring the matter to a United States Magistrate for processing and disposition as a complaint challenging conditions of confinement.

DATE: December 26, 1984

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Caption Omitted in Printing)

ORDER

[Filed 1/4/85]

For the reasons stated in the attached Memorandum it is this 26th day of December, 1984, by the United States District Court for the District of Maryland ORDERED:

1. That the motion to dismiss of defendant Barry BE, and the same hereby IS, GRANTED.

2. That the subject action BE, and the same hereby IS, DISMISSED AS TO DEFENDANT BARRY.

3. That insofar as the remaining complaints are concerned, the matter BE, and the same hereby IS, referred to Daniel E. Klein, Jr., United States Magistrate, for processing and disposition as a complaint challenging conditions of confinement.

4. That the Clerk of the Court is directed to mail copies of this Order and foregoing Memorandum to the plaintiff and counsel for all parties.

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Caption Omitted in Printing)

JUDGMENT

This action came on for trial before the Court and a jury. The plaintiff's case having been tried, and defendants having orally moved for a Directed Verdict at the conclusion of plaintiff's case-in-chief, and the Court having granted said motion as to defendants Collins, Galley, Carpenter, Hall and Turner, and granting in part and denying in part, said motion as to remaining defendants; and the jury having answered and returned the Special Verdict Form,

It is Ordered and Adjudged that Judgment be and the same hereby is ENTERED in favor of plaintiff William Lewis Smith against defendants Robert Ellis and Daniel Porecki on the claim of deliberate indifference to plaintiff's medical and psychological needs, and awarding plaintiff compensatory damages in the amount of Fifteen Thousand Dollars ($15,000), and

It is further Ordered and Adjudged that Judgment be and the same hereby is entered in favor of defendants R. Brown, Officer Jackson, Sergeant R. Victor, Officer Wilkins, Jon P. Galley, George H. Collins, Commander Captain Carpenter, Officer R. Hall, and Sergeant Arnold Turner against plaintiff William Lewis Smith.

Dated at Baltimore, Maryland this 29th day of February, 1988.

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
United States District Judge

[Filed 2/29/88]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Caption Omitted in Printing)

ORDERED this 14th day of March, 1988, that the time for filing motion for attorney's fees is hereby extended to 20 days after the Court's ruling on the pending motion for judgment notwithstanding the verdict.

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.

[Filed March 15, 1988]

[Entered on face of letter from counsel for Smith to the District Court. Letter omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Caption Omitted in Printing)

NOTICE OF APPEAL

Notice is hereby given that WILLIAM LEWIS SMITH, plaintiff above named, appeals to the United States Court of Appeals for the 4th Circuit from the judgment/order of the United States District Court for the 1 District of Maryland, entered in this action on March 15, 1988.

Respectfully submitted,

/s/ William Lewis Smith
WILLIAM LEWIS SMITH pro se
#148-098
Roxbury Correctional Institution
Route 3, Box 4444
Hagerstown, Maryland 21740

Dated: March 15, 1988 [Filed 3/22/88]

(Certificate of Service Omitted in Printing)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-7096

SMITH

v.

GALLEY

ORDER TO PROCEED ON INFORMAL BRIEF

[Filed 4/13/88]

This appeal having been filed in this Court and it appearing that at least one party is proceeding without counsel, IT IS ORDERED:

1. The case shall be submitted on the lower court record and, at the election of the parties, on informal briefs, the form for which is attached. Parties may, but need not, cite statutes and legal authority to support their contentions. Only the basic facts and issues need be set forth, as requested on the form. If a supporting memorandum is essential to address the issues adequately, it may attached to the briefing form.

The Court will review the entire record on appeal for possible meritorious issues, it will not limit its review solely to the issues raised in the parties' briefs.

2. The six-digit docket number appearing on the first page of this order shall be placed prominently on every paper filed by any party to this appeal, as well as on all correspondence addressed to the Court.

3. Parties electing to submit informal briefs shall mail their briefs to the Court, with copies to all parties, NO LATER THAN May 4, 1988.

4. The original and one copy of the parties' briefs shall be mailed to the Court, with first class postage prepaid and affixed, addressed as follows:

United States Court of Appeals
for the Fourth Circuit
United States Courthouse
10th and Main Streets
Richmond, VA 23219

5. Every document mailed to the Court by any party must bear a notation that a complete copy thereof was mailed to all other parties at the same time; the Court must receive the original and one copy of every such document. The notation must show the complete name and mailing address of the persons to whom the copies were sent and the date of mailing.

6. Extensions of briefing deadlines are not favored by the Court and are granted only for good cause stated in writing. Requests for extensions MUST BE RECEIVED BY THE COURT BEFORE THE EXPIRATION OF THE DEADLINE.

7. Transcript of trial proceedings WILL NOT be prepared at government expense except in those limited cases in which the Court concludes from the briefs, the claims of the parties, and the record that the appeal presents a substantial question that cannot be determined without a transcript.

8. The Court will not appoint counsel or schedule an appeal for oral argument unless it concludes, after having reviewed the case, that the appeal cannot be decided on the basis of the informal briefs and the record. Therefore, it is unnecessary to request the appointment of counsel or oral argument.

9. Appellants may, but need not, file a docketing statement within 10 days of filing of the notice of appeal. The form and instructions should already have been provided to appellant by the district court.

JOHN M. GREACEN
Clerk

(Copy List Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. B-83-3395

WILLIAM LEWIS SMITH

v.

JON P. GALLEY, ETC., *et al.*

MEMORANDUM OPINION

[Filed 4/14/88]

This case was tried before a jury which, after its deliberations, returned a verdict in favor the plaintiff, William Lewis Smith, against the defendants Robert Ellis and Daniel Porecki in the amount of $15,000.00. On February 29, 1988, this Court entered judgment on the verdict. On March 4, 1988, the defendants filed a Motion for Judgment Notwithstanding the Verdict (Paper 62). The plaintiff has filed an opposition to defendants' motion (Paper 63). The Court finds that no hearing is required. *See* Local Rule 6(E).

At the outset, the Court finds that this case was fully tried and argued before the jury by expert counsel. The contentions made by the defendants in their post-trial motion were previously considered and rejected by the Court. The points raised by the defendants do not require that the Court enter judgment notwithstanding the verdict.

In their motion, the defendants assert the right to a verdict in their favor as a matter of law, based on the

assertion that the jury could not find on the evidence presented that the defendants were deliberately indifferent to the plaintiff's medical needs by the denial of a wheelchair. The Court is satisfied that on the basis of the evidence presented at the trial, the jury could weigh the evidence and judge the credibility of the witnesses, reaching a verdict in favor of the plaintiff in accordance therewith. The jury could properly conclude from the testimony of the plaintiff and his witnesses and the testimony of the defendants themselves that the defendants showed the required deliberate indifference, and this conclusion was supported by the testimony of the plaintiff's expert. Under the circumstances, the position of the defendants is without merit and the pending motion will be denied by a separate Order to be entered by the Court.

April 13, 1988

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Caption Omitted in Printing)

ORDER

For the reasons set forth in the aforegoing Memorandum Opinion, IT IS, this 13th day of April, 1988, by the United States District Court for the District of Maryland,

ORDERED:

(1) That defendants' Motion for Judgment Notwithstanding the Verdict (Paper 62) BE, and the same hereby IS, DENIED; and

(2) That the Clerk shall mail copies of the aforegoing Memorandum Opinion and this Order to counsel of record.

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
United States District Judge

[Filed 4/14/88]

LAW OFFICES
WHITEFORD, TAYLOR & PRESTON
Suite 1400
Seven Saint Paul Street
Baltimore, Maryland 21202-1626
301 347-8700

April 21, 1988

Mr. William Lewis Smith
No. 148-098
Roxbury C. I.
Route 3, Box 444
Hagerstown, MD 21740

Re: Smith v. Galley, et al

Dear Mr. Smith:

Mr. Bell has informed me that you have attempted to appeal this matter. Although you did not send me a copy of this Notice of Appeal, I am certain from the circumstances that it is premature and thus void.

I again strenuously urge you not to appeal this matter. I do not think there are any issues which you will be able to prevail upon before the Fourth Circuit. The Order denying the Motion for J.N.O.V. was entered April 13, 1988. This would give you up until May 13, 1988 before you must file an appeal. I would urge you to take by advice and not file an appeal, or at least seek a second legal opinion on the matter.

As you know, our representation of you has now ended with the successful resolution of the Motion for J.N.O.V. I have spoken to your mother and have informed her of this result and I again urge that you get together with your family and mutually decide upon an appropriate way to disburse, handle or invest the judgment that you

will soon be awarded. I have met your mother and your sisters and I believe that they will be very helpful in this regard, and will do their utmost to look after your interests and that of your family. I do not believe, personally, that you should use any of this judgment to hire lawyers to bring further actions on your behalf.

Yours very truly,

/s/ Leo P. Hylan
LEO P. HYLAN

LPH:cal
cc: The Honorable Walter E. Black, Jr.
Civil Action No. B-83-3395
Glenn W. Bell, Esquire

DICTATED BUT NOT READ

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

88-7096

SMITH

v.

GALLEY

CA-83-3395-B

INFORMAL BRIEF SUBMITTED ON BEHALF OF APPELLEE WAYNE S. BARRY, M.D. IN SUPPORT OF THE DISTRICT COURT'S ORDER GRANTING DR. BARRY'S MOTION TO DISMISS

[Filed 4/28/88]

---

1. Did the district court fail to consider important grounds for relief. If so, what grounds?

   In granting Dr. Barry's Motion to Dismiss this action against him, the district court properly considered all relevant grounds for relief.

2. Did the district court incorrectly decide the facts? If so, what facts.

   In dismissing the appellant's claim against appellee Dr. Barry the district court assumed all facts pleaded by the plaintiff in its complaint were true. The

court's decision as to Dr. Barry was based on the law and did not require finding of facts.

3. Do you think the district court applied the wrong law? If so, what law do you want applied.

In dismissing the action against Dr. Barry, the court applied the correct law.

On or about February 15, 1984, plaintiff, then an inmate at the Maryland Penitentiary, brought this action pursuant to 42 U.S.C. 1983 against a number of defendants including Wayne S. Barry, M.D. As a member of Chesapeake Physicians, P.A., ("CPPA"), a Maryland not-for-profit professional association comprising physicians and other health care personnel providing medical services to the general public, Dr. Barry provided medical care to inmates at the Maryland Penitentiary, including the plaintiff. Plaintiff alleged that Dr. Barry did not provide him with appropriate medical treatment and that Dr. Barry's actions violated 42 U.S.C. § 1983.

Dr. Barry moved for dismissal of the action, basing his motion on three decisions in which the United States District Court for the District of Maryland ruled that CPPA health care personnel do not act under color of state law when they provide medical services to inmates at the penitentiary. *See*, memorandum in support of motion to dismiss attached hereto as Exhibit A.

The district court granted Dr. Barry's motion to dismiss, finding that he did not act under color of state law in providing medical services to the plaintiff and, therefore, was not subject to suit under § 1983. The district court ruled:

> Barry's affidavit attached to his motion to dismiss clearly shows, and it is uncontradicted by the plaintiff, that he was an employee of Chesapeake Physicians, P.A. at all pertinent times regarding this complaint. He further swears that he had no custodial or supervisory duties but acted solely in the capacity of a physician.

In support of its ruling, the Court relied on *Calvert v. Sharp*, 748 F.2d 861, (4th Cir. 1984) *cert. denied*, 105 S.Ct. 2667 (1985). In that case, the Fourth Circuit held that in treating inmates, a physician employed by Chesapeake Physicians, P.A. was not acting under color of state law and, therefore, could not be sued pursuant to 42 U.S.C. 1983 (*See*, Memorandum of district court attached hereto at Exhibit B).

4. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

The district court's decision was correct for the reasons described above.

5. What action do you want the Court to take in this case?

The United States Court of Appeals for the Fourth Circuit should affirm the district court's decision granting Dr. Barry's Motion to Dismiss.

6. If you think the Court should hear oral argument in this case, why do you think so?

Because the district court's decision dismissing the suit against Dr. Barry was correct pursuant to established law in this Circuit, oral argument probably would not be necessary, although counsel, of course, stands ready to orally argue the case should the Court so desire.

/s/ David H. Bamberger
DAVID H. BAMBERGER

/s/ Elaine Marzetta Lacy
ELAINE MARZETTA LACY

PIPER & MARBURY
1100 Charles Center South
36 South Charles Street
Baltimore, Maryland 21201
(301) 539-2530

Attorneys for Appellee Wayne S. Barry, M.D.

(Certificate of Service Omitted in Printing)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Caption Omitted in Printing)

INFORMAL BRIEF

[Filed 5/4/88]

Directions: Answer the following questions about the appeal to the best of your ability. Use additional sheets of paper, if necessary. You need not limit your brief solely to this form but you should be certain that whatever you file answers the questions below. In any event, the court prefers short and direct statements.

1. Did the district court fail to consider important grounds for relief. If so, what grounds?

   (a). Yes, The court only appointed counsel to represent the Plaintiff on his 42. U.S.C. 1983 complaint. The plaintiff had filed on July 26, 1985, "Motion For Leave To File Amended Complaint or Supplemental Complaint" into the Court seeking counsel for his serious medical problems, and requesting a Preliminary Hearing. Requesting appointment of Counsel.

   (b). The Court appointed counsel and at trial The plaintiff counsel and the defendants' counsel concealed vital evidence . . . See attached extra sheet, 1-b.

2. Did the district court incorrectly decide the facts? If so, what facts?

   It is Plaintiff contention that the Court and Jury was unable to rule fairly to the facts, and the awarding of damages in to Plaintiff, due to the facts that vital

evidence (medical records, exhibits, witness, and other issues of extreme importance to my case.), was being suppressed by Plaintiff's counsel and the defendants' counsel. This suppression by both attorneys', of evidence, was done without my knowledge and against my wishes. The plaintiff had requested in his complaint to properly conduct his medical records in open court.

3. Do you think the district court applied the wrong law? If so, what law do you want applied?

   I don't know.

4. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

   (a). *A conflict of Interest*; the lawfirm of WHITEFORD, TAYLOR & PRESTON, and plaintiff's counsel are affiliated to partipants in plaintiff's previous lawsuit, which is the parties members. Thus, the plaintiff was denied his constitutional right to a fair and impartial trial for the reason that Plaintiff attorney failed to adequately and competently represent him; Also, Plaintiff was denied his constitutional right to due process and equal protection of law. Thus, the plaintiff beleave this resulted in the Court being unable to render a fair decision in my case.

5. What action do you want the Court to take in this case?

   (1). A new trial on all issues triable by Jury.

   (2). (a). That Plaintiff's medical records are properly conducted in the Court. (b). The Court to investigate conflict of Interest. The plaintiff beleave that there were conspiracy acts by his attorney and defendants' attorney, to suppress plaintiff medical records; thus, leaving the Court and Jury unable to ren-

der a fair decision and/or verdict in the Plaintiff Case. (c). The Plaintiff beleave that the Court should review all evidence pretaining to his case, and the award of damages which plaintiff do beleave was grossly inadequate . . . See attached extra sheet; 5-d.

6. If you think the Court should hear oral argument in this case, why do you think so?

   Yes, the Plaintiff do beleave in all fairness to his case, and for himself, his legal counsel, and/or representative, to be allowed to hear in open Court Plaintiff's medical records, presentment of all evidence, be it physical or oral, the Plaintiff do beleave that it will give the Court and Jury a clearer vision of Plaintiff's medical condition, that his counsel and defendants counsel suppressed from the Court by ruling out.

/s/ William Lewis Smith
Signature
Notary Not Required

Dated: April 28, 1988

IMPORTANT: A COPY OF THIS BRIEF AND ANY ATTACHMENTS MUST BE SENT TO ALL PARTIES IN THE CASE. PLEASE LIST BELOW THE NAMES AND ADDRESSES OF THE PARTIES WHO WERE SENT A COPY OF YOUR BRIEF, TOGETHER WITH THE DATES ON WHICH THEY WERE SENT.

(List and Certificate of Service Omitted in Printing)

88-7096 Smith vs. Galley, et al.
CA-83-3395-B

William Lewis Smith
ROXBURY CORRECTIONAL INSTITUTE
Route 3, Box 4444
Hagerstown, MD 21740

ATTACHED—Extra Sheet from informal brief:

Continued; 1-b

> . . . (medical records, exhibits, witnesses, and other issues of extreme importance to the Plaintiff's case.) thus, the Plaintiff beleave that the Court and Jury was unable to render a fair verdict and/or decision in his case. This suppression of evidence was done without his knowledge and against his wishes.

Continued; 5-d

> . . . to the suffering the Plaintiff have been subject to, and what he is still enduring. (e). That a U.S. Federal Investigation by the U.S. Justice Department and U.S. Attorney, and to take legal action against all parties who are responsible for their conspiracy to commit fraud, wrong doing, malice, etc., etc., to the Plaintiff. (f). Appellant cost of this suit. (g). Such other and futher relief as law and justice may require.
>
> /s/ William Lewis Smith
> WILLIAM LEWIS SMITH

Dated: April 28, 1988

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Caption Omitted in Printing)

SUPPLEMENT TO INFORMAL BRIEF OF APPELLEE WAYNE S. BARRY, M.D.

[Filed 6/24/88]

Appellant William Lewis Smith, who was formerly an inmate at the Maryland Penitentiary and now is incarcerated at the Roxbury Correctional Institution in Hagerstown, Maryland, brought this action against approximately fifteen defendants, including Wayne S. Barry, M.D. At the time in question, Dr. Barry was a private physician who provided medical services to inmates at the Maryland Penitentiary pursuant to a contract with the State of Maryland.

As explained more fully in the Informal Brief previously filed on behalf of Dr. Barry, the United States District Court for the District of Maryland granted Dr. Barry's Motion to Dismiss on December 26, 1984, finding that he did not act under color of state law in providing medical services to the plaintiff and, therefore, was not subject to suit under 42 U.S.C. § 1983. In support of its ruling, the District Court relied on *Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985). The claims against the remaining defendants were referred to a United States Magistrate for trial. In the Informal Brief filed herein, Dr. Barry referred this Court to its earlier ruling in the *Calvert* case.

On June 20, 1988, the Supreme Court of the United States decided *West v. Atkins*, Case No. 87-5096, which, in effect, overruled *Calvert v. Sharp*. However, notwithstanding the *West* decision, the dismissal of Dr. Barry still should not be reversed, because no appeal from the December 26, 1984 Order of Dismissal was taken by the plaintiff. The Notice of Appeal filed in this action on March 22, 1988 provides:

> Notice is hereby given that William Lewis Smith, plaintiff above named, appeals to the United States Court of Appeals for the 4th Circuit *from the judgment/order* of the United States District Court for the 1 (sic) District of Maryland, *entered in this action on March 15, 1988*. (emphasis supplied)

Thus, the December 26, 1984 dismissal of Dr. Barry is not even before this Court and, therefore, should not be disturbed.

Respectfully submitted,

/s/ David H. Bamberger
DAVID H. BAMBERGER

/s/ Elaine M. Lacy
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(Certificate of Service Omitted in Printing)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Caption Omitted in Printing)

SUPPLEMENT TO INFORMAL BRIEF OF APPELLANT WILLIAM LEWIS SMITH

[Filed 7/20/88]

Appellant William Lewis Smith, who was an inmate at the Maryland State Penitentiary and now is incarcerated at the Roxbury Correctional Institution in Hagerstown, Maryland, brought this action pursuant to 42 U.S.C. 1983, 1985 and 28 U.S.C. 1343 against approximately 15 defendants, including Wayne S. Barry, M.D. At the time, Dr. Barry was a physician employed by Chesapeake Physicians, P.A. ("CPPA") who provided medical services to inmates at the Maryland State Penitentiary pursuant to a contract with the State of Maryland.

As is more fully set forth in the Memorandum of William Lewis Smith attached as Exhibit 1 to the Supplement to Informal Brief filed herewith, as the Court will see that Appellant tried to protect his legal rights and the Appellees, in addition to other parties associated with them who are now health care providers (PHP incorporation) contracted with the State of Maryland to provide medical treatment to inmates; have all but made it impossible for Appellant to obtain outside (Hospital) medical treatment that is required to relieve his serious medical injuries that he was, and is, being compelled to suffer for numerous months and years by the health care providers contracted with the State of Maryland.

Appellant's serious medical problems remain in existence, and allowed to deteriorate. The Appellant pray's that this Court will consider the fact that, in the enormous amount of time that has past, Appellant has struggled persistently to secure his legal constitutional rights, and in seeking medical treatment that is required to relieve his pain and suffering. Appellant declares that the Appellees acted with gross negligence and in reckless disregard of his medical needs as well as psychiatric needs. And, he has proven that his allegations simply do constitute a prima facie claim.

The health care providers, then, and now, continue to act with gross negligence and in reckless disregard of Appellant's health by deliberately and willfully refusing to transport the Appellant to an outside public hospital to be treated for his medical problems. *Feilder v. Bosshard*, 590 F. 2d 105 (5th Cir. 1979) and *U.S. ex rel Walker v. Fayette City* 599 F. 2d 573 (3rd Cir. 1979). As well as the Appellant's case *Smith v. Galley, et al.*, B-83-3395. *West v. Atkins*, Case No. 87-5096, which in effect, overruled case of *Calvert v. Sharp*, 748 F. 2d 861 (4th Cir. 1984), cert. denied, 471 U.S. 1132 (1985). Dr. Barry's Motion should be denied.

The U.S. District Court was aware of Appellant's place of confinement, as mention in his 42 U.S.C. 1983 complaint and affidavits; also, other court motions that was presented to the Court that had explain the Appellant's inability to present his claims to the U.S. Court. *Cruz v. Beto*, 405 U.S. 319 (1972) *Haines v. Kerner*, 404 U.S. 519 (1972). *Potter v. McCall* 433 F. 2d 1087 (9th Cir. 1970). *Gordon v. Lceks*, 579 F. 2d 1147, 1153 (4th Cir. 1978), *Almond v. Kent*, 459 F. 2d 200, 204 (4th Cir. 1972).

The Appellant, William Lewis Smith, prays that this Court Deny the District Court's order granting Dr. Barry's Motion to Dismiss.

NOTE: The Court has seen the extent of our pressing situation and difficulties inmates are having across the Nation in dealing with outside contractors who will not and/or refuse to treat them for their medical needs.

Respectfully submitted,

/s/ William L. Smith
WILLIAM L. SMITH
#148-098
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Hagerstown, Maryland 21740

(Certificate of Service Omitted in Printing)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Caption Omitted in Printing)

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Walter E. Black, Jr., District Judge. (CA-83-3395-B)

Argued: April 3, 1990 Decided: November 29, 1990

Before RUSSELL and WIDENER, Circuit Judges, and SMITH, United States District Judge for the Eastern District of Virginia, sitting by designation.

Dismissed by published opinion. Judge Widener wrote the opinion, in which Judge Russell and Judge Smith joined.

WIDENER, Circuit Judge:

William Smith prosecutes his appeal from two adverse orders of the district court in his action under 42 U.S.C. § 1983. Because Smith did not properly perfect his appeal, we are without jurisdiction to consider the orders in question and we therefore dismiss the appeal.

William Smith, an inmate at the Maryland State Penitentiary, suffers from a psychogenic pain disorder that,

although psychological in nature, causes him severe pain and prevents him from walking. After two prison psychologists decided to deny Smith the use of a wheelchair, Smith brought this action, pro se, pursuant to 42 U.S.C. § 1983 against Commissioner of Corrections Jon Galley, Warden George Collins, staff psychologists Robert Ellis and Daniel Porecki, seven correctional officers, and one private medical doctor, Wayne Barry. Smith alleged that, by denying him the use of a wheelchair, the defendants exhibited a deliberate indifference to his medical needs in violation of the eighth amendment to the Constitution.[1]

Because Dr. Barry was employed not by the state but by a private medical group, the district court dismissed the case as to Dr. Barry because he could not have acted under color of state law for purposes of section 1983.[2] The claims against the remaining defendants proceeded to a trial before a jury. At the conclusion of Smith's case, the district court directed a verdict in favor of Galley, Collins, and three of the correctional officers. The district court also directed verdicts on the deliberate indifference claim as to the remaining four correctional officers, all prison guards.[3] The jury found that the psychologists, Ellis and Porecki, were deliberately indifferent to Smith's medical needs and awarded Smith $15,000 in damages. A judgment reflecting the district

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[1] Smith also asserted another claim by alleging that several guards beat him. The trial jury found in favor of the guards on the issue, and Smith does not challenge that verdict on appeal.

[2] The district court relied on our decision in *Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985). The Supreme Court later overruled *Calvert* in *West v. Atkins*, 487 U.S. 42 (1988), which established that a private contract physician who provides medical services to state inmates may act under color of state law for purposes of section 1983.

[3] Smith's excessive force claim was allowed to proceed against four of the guards. See note 1, *supra*.

court's rulings and the jury's findings was entered on February 29, 1988.

On March 4, 1988, Ellis and Porecki filed a motion for judgment notwithstanding the verdict. On March 22, 1988, Smith, acting pro se,[4] filed a notice of appeal. The district court then entered an order on April 14, 1988, denying the psychologists' motion for judgment notwithstanding the verdict. Later, on May 4, 1988, Smith filed an informal brief in this court requesting "[a] new trial on all issues triable by Jury."

Federal Rule of Appellate Procedure 4(a)(4) provides that, if any party files a timely motion for judgment notwithstanding the verdict, a notice of appeal filed before disposition of the motion is ineffective and a new notice of appeal must be filed after the order is entered disposing of the motion.[5] Therefore, Smith does not take exception to the fact that his first notice of appeal was premature and had no effect. Smith contends, however, that his informal brief, which was filed in this court within thirty days of the district court's order disposing

[4] Smith was represented by appointed counsel at trial and in opposing the psychologists' motion for judgment notwithstanding the verdict. Smith filed his notice of appeal without consulting his lawyer. That notice of appeal was from an order of the district court entered March 15, 1988. The only order entered on March 15, 1988, concerned an extension of time for filing a request for attorneys' fees. We do not base our decision on this error, if any, however. See note 7, *infra*.

[5] Fed. R. App. P. 4(a)(4) provides in part:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); . . . the time for appeal for all parties shall run from the entry of the order . . . granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

of the psychologists' motion for judgment notwithstanding the verdict, effectively substituted for a second notice of appeal.[6] Relying on his informal brief as a notice of appeal, Smith then challenges the district court's order dated December 26, 1984, which dismissed Dr. Barry as a defendant, and that part of the district court's February 29, 1988, order which entered judgment in favor of the prison guards on the deliberate indifference claim.

The requirements for a notice of appeal are set forth in Fed. R. App. P. 3(c):

> (c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken.

To avoid technical impediments to appellate review, courts construe Rule 3(c) liberally, especially when applied to papers filed pro se by an indigent prisoner. See *Coppedge v. United States*, 369 U.S. 438, 442 n.5 (1962); *Fishbaugh v. Armour & Co.*, 185 F.2d 541, 542 (4th Cir. 1950), *cert. denied*, 342 U.S. 914 (1952). Thus, Rule 3 is satisfied "by any statement . . . that clearly evinces the party's intent to appeal" and which "accomplishes the two basic objectives of the Rule 3 notice requirement: (1) to notify the Court of the taking of an appeal; and (2) to notify the opposing party of the taking of the appeal." *Cobb v. Lewis*, 488 F.2d 41, 45 (5th Cir. 1974). Stated another way, the question we must

[6] If Smith's informal brief is treated as a notice of appeal, it was timely filed. Fed. R. App. P. 4(a)(1) provides:

> [T]he notice of appeal . . . shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from . . . . If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

resolve is whether Smith's informal brief is the "functional equivalent" of a notice of appeal under Rule 3(c). See *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988).

We believe for several reasons that the rationale for allowing other documents to substitute for a notice of appeal simply does not apply to Smith's informal appellate brief filed in this case. First, Smith's informal brief is a preprinted form that the clerk's office sent to Smith because he filed his premature notice of appeal pro se. See Loc. R. 34(b). Thus, the document was not the result of Smith's intent to initiate an appeal, but was merely Smith's response to this court's "Order to Proceed on Informal Brief." There can be no doubt, however, that the papers were filed by Smith as part of the appellate process.

Second, the normal solicitude afforded to pro se litigants is greatly diminished, even if not erased, in this case. When Smith's appointed counsel, who had just concluded Smith's successful opposition to the psychologists' motion for J.N.O.V., heard that Smith had filed a notice of appeal while the motion for J.N.O.V. was pending, he notified Smith by letter dated April 11, 1988, that

> Mr. Bell has informed me that you have attempted to appeal this matter. Although you did not send me a copy of this Notice of Appeal, I am certain from the circumstances that it is premature and thus void. . . . The Order denying the Motion for J.N.O.V. was entered April 13, 1988. This would give you up until May 13, 1988, before you must file an appeal.

Smith's counsel correctly advised Smith of his failure to perfect his appeal, and of the time remaining in which to correct his mistake. Smith, however, did nothing, and has provided no justification to heed counsel's advice.

Finally, in addressing this same issue in a case of first impression, the Fifth Circuit recently stated:

> Faced squarely with the issue, we now determine that an appellate brief will not substitute for a notice of appeal, even if it otherwise meets the requirements of Fed. Rules App. P. 3 and 4. The Federal Rules of Appellate Procedure envision the notice of appeal and the appellate brief as two separate filings. To collapse the two into one would, as the Eleventh Circuit implied, "eliminate entirely the requirement for the filing of a notice of appeal."

United States v. Cooper, 876 F.2d 1192, 1196 (5th Cir. 1989) (quoting *Florida Women's Medical Clinic, Inc. v. Smith*, 706 F.2d 1172, 1173 (11th Cir. 1983)). *Contra Frace v. Russell*, 341 F.2d 901 (3d Cir.), *cert. denied*, 382 U.S. 863 (1965). We agree with the Fifth and Eleventh Circuits and we conclude that, although we should and do afford pro se litigants latitude where warranted, we are not free to rewrite the Federal Rules of Appellate Procedure. The requirements of Rule 3 are jurisdictional and are not subject to harmless error analysis. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 and n.3 (1988).

Accordingly, this appeal is

DISMISSED.[7]

---

[7] Appellees also assert that Smith's informal brief fails to comply with Fed. R. App. 3(c)'s command to "designate the judgment, order or part thereof appealed from." The order dismissing Dr. Barry was entered in December 1984, while the order granting judgment to the guards was entered February 29, 1988. Smith's informal brief refers to none of the appellees or the respective orders specifically, however, but merely asks for "[a] new trial on all issues triable by Jury." Even if we refer back to Smith's premature notice of appeal to help fulfill this requirement, see *Foman v. Davis*, 371 U.S. 178, 181 (1962), that notice mistakenly identifies the district court's March 15, 1988, order, which only extended the time for filing Smith's motion for attorneys' fees. In view of our disposition, we express no opinion on this issue. See note 4, *supra*.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Caption Omitted in Printing)

Appeal from the United States District Court
for the District of Maryland

JUDGMENT

FILED: November 29, 1990

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal be, and it is hereby, dismissed.

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Caption Omitted in Printing)

ORDER

FILED: December 26, 1990

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Russell and Judge Smith.

/s/ H. E. Widener, Jr.
For the Court

[Jurat omitted in printing]

SUPREME COURT OF THE UNITED STATES

No. 90-7477

WILLIAM LEWIS SMITH,
Petitioner,

v.

WAYNE S. BARRY, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ON CONSIDERATION of the motion of petitioner for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered that the motion to proceed *in forma pauperis* and the petition for writ of certiorari are granted.

June 28, 1991

Supreme Court, U.S.
FILED
AUG 26 1991
OFFICE OF THE CLERK

No. 90-7477

In The

Supreme Court of the United States

October Term, 1991

WILLIAM LEWIS SMITH,

Petitioner,

v.

WAYNE S. BARRY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a pro se pleading, in the form of a brief, may serve as a notice of appeal within the meaning of Rule 3(c) of the Federal Rules of Appellate Procedure, if it contains the information required by that rule, is timely filed, and notifies the court and the parties of the appellant's intent to appeal?

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The opinion of the Court of Appeals, J.A. 32-37, is reported at 919 F.2d 893. The judgment of the Court of Appeals, J.A. 38, is not reported. The judgment of the United States District Court for the District of Maryland, J.A. 8, is not reported.

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1) (1988). The judgment of the Court of Appeals was entered on November 29, 1990. A petition for rehearing and a suggestion for rehearing *en banc* were denied on December 26, 1990. The petition for a writ of certiorari was filed with this Court on March 22, 1991.

RULES INVOLVED

The pertinent portions of the following rules are reproduced in the appendix to this brief:

1. Rule 3(a) and (c) of the Federal Rules of Appellate Procedure (with pertinent portions of the Notes of the Advisory Committee on Appellate Rules);
2. Rule 4(a) of the Federal Rules of Appellate Procedure (with pertinent portions of the Notes of the Advisory Committee on Appellate Rules);
3. Form 1 of the Federal Rules of Appellate Procedure;
4. Local Rule 34(b) of the United States Court of Appeals for the Fourth Circuit;

5. Internal Operating Procedure 34.6 of the United States Court of Appeals for the Fourth Circuit; and

6. Internal Operating Procedure 46.5 of the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE

Petitioner, William Lewis Smith, challenges the Fourth Circuit's refusal to consider his pro se informal appellate brief as a valid notice of appeal within the meaning of Rule 3(c) of the Federal Rules of Appellate Procedure ("Rule 3(c)").

On September 27, 1983, Smith, then an inmate at the Maryland Penitentiary, brought this pro se[1] action pursuant to 42 U.S.C. § 1983 against then State Commissioner of the Division of Corrections Jon P. Galley; Maryland Penitentiary Warden George H. Collins; seven correctional officers, Lawrence Carpenter, Robert Victor, Arnold Turner, Bobby R. Hall, Robert Brown, David Jackson, and Lakamon Wilkins; two staff psychologists, Dr. Daniel Porecki and Dr. Robert Ellis (collectively "the State employees"); and one medical doctor, Dr. Wayne Barry, claiming violations of his eighth amendment rights. R. 1. Smith suffered from a psychogenic pain disorder which prevented him from walking or placing any weight on his legs and feet. J.A. 32-33. In his suit, he alleged, *inter alia*,

[1] While Smith filed his action pro se, counsel was appointed on October 18, 1985 to represent him in the district court. R. 40. Trial counsel declined to represent Smith on appeal, R. 67, and Smith proceeded pro se until the Fourth Circuit appointed counsel on August 2, 1989.

that the prison's medical, psychological, and custodial staffs denied him a wheelchair for over two years, and that his inability to walk, combined with the defendants' decision to force him to exist without a wheelchair, resulted in his sustained inhuman treatment. R. 1.

One of the defendants named above, Dr. Barry, is a private physician who treated Smith and generally provided medical services to inmates at the penitentiary pursuant to a contract with the State of Maryland. J.A. 33. After being served with Smith's complaint, Barry filed a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, alleging that he provided nonsupervisory, noncustodial medical services to inmates and, therefore, did not act under color of state law as required by 42 U.S.C. § 1983. R. 23. The district court entered an order dismissing Barry, relying entirely on *Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984) (physicians who provide nonsupervisory and noncustodial medical services to inmates pursuant to a contract with the state do not act under color of state law), *cert. denied*, 471 U.S. 1132 (1985). J.A. 4-7.

At trial, Smith claimed that six correctional officers physically abused him and were deliberately indifferent to his medical needs because they intentionally denied him a wheelchair. At the conclusion of Smith's case in chief, the district court on February 24, 1988 directed a verdict in favor of all of the prison guards as to the claim regarding denial of the wheelchair. The court found "no evidence that would show that they are in a position to act in any meaningful way in regard to the Plaintiff's medical and psychological needs . . . . " Tr. 41 (Feb. 24,

1988).[2] The excessive force claims against four of the guards (Victor, Wilkins, Jackson, and Brown) went forward, and the jury found in favor of the guards. R. 57. The jury also found that the two psychologists, Ellis and Porecki, were deliberately indifferent to Smith's serious medical needs and awarded Smith $15,000 in damages. R. 57.

On February 29, 1988, the district court entered judgment in favor of Smith and against Ellis and Porecki, and in favor of the remaining State employees and against Smith. J.A. 8. The two psychologists filed a motion for judgment notwithstanding the verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. The district court entered an order denying the motion on April 14, 1988. J.A. 16. Smith's counsel responded to the motion for judgment notwithstanding the verdict, R. 63, but declined to represent Smith on appeal. J.A. 17.

On March 22, 1988, while the Rule 50(b) motion was pending, Smith filed a pro se notice of appeal. J.A. 10. Under Rule 4(a)(4) of the Federal Rules of Appellate Procedure, "[a] notice of appeal filed before the disposition of [a Rule 50(b) motion] shall have no effect." Even

[2] The district court also granted a directed verdict in favor of Commissioner of Corrections Galley and Penitentiary Warden Collins on the excessive force and deliberate indifference claims because they were not personally involved in the decision to deny Smith a wheelchair and, as supervisory personnel, they were not legally responsible for an isolated incident involving the use of excessive force. Tr. 38-39 (Feb. 24, 1988).

though Smith's notice of appeal was a nullity, no party moved for dismissal, and the appeal proceeded.[3]

Pursuant to Fourth Circuit Local Rule 34(b), *see* App. 10, the clerk's office sent pre-printed "informal brief" forms to all of the parties in the case after Smith filed his pro se appeal. J.A. 11-13. Informal briefs are used by the Fourth Circuit whenever: 1) a pro se appeal is filed; 2) an application for a certificate of probable cause from the denial of a writ of habeas corpus is made; or 3) an appeal from the denial of a motion under 28 U.S.C. § 2255 is taken. App. 10. Although titled informal briefs, these papers become the primary documents of advocacy as "parties may file a formal brief only with the permission of the Court." App. 11.

Barry, represented by counsel, was the first to respond to Smith's appeal: On April 28, 1988, he filed the informal brief form that had been sent to him by the clerk's office. J.A. 19-22. The informal brief relied entirely on the Fourth Circuit's decision in *Calvert* to support Barry's dismissal from the case. He made no claim that Smith's notice of appeal was premature.

On May 4, 1988, Smith, proceeding pro se, filed his informal brief, 20 days after the Rule 50(b) motion was

[3] On April 21, 1988, Smith's former attorney sent him a letter stating that the notice of appeal was premature and that Smith had until May 13, 1988 to file a timely notice of appeal. He also strongly suggested that Smith abandon any appeal and made it clear that, if Smith decided to proceed, he would not represent him. J.A. 17-18. Although this letter also was sent to the Assistant Attorney General representing the State employees and the district court judge, the appeal proceeded.

denied and within the required time period for filing a notice of appeal. J.A. 23-26. Smith answered the questions on the form and sent copies to the Fourth Circuit and all parties. In response to the question, "What action do you want the Court to take in this case," Smith responded, in part, that he wanted "[a] new trial on all issues triable by Jury." J.A. 24.

On June 24, 1988, Barry filed a supplement to his informal brief, addressing this Court's decision in *West v. Atkins*, 487 U.S. 42 (1988), which overruled *Calvert*. J.A. 27-28. He abandoned the claim that he was not subject to suit because of *Calvert*. In the final two paragraphs of the supplement, however, Barry asserted for the first time that the propriety of his dismissal from the case was not properly before the Fourth Circuit because "no appeal from the December 26, 1984 Order of Dismissal was taken by the plaintiff." J.A. 28. Again, at no point in the supplement did Barry mention that Smith's notice of appeal was filed prematurely. On July 20, 1988, Smith responded to Barry's supplement by filing a supplement to his own informal brief requesting that the Fourth Circuit reverse the district court's order granting Barry's motion to dismiss. J.A. 29-31.

The State employees, represented by the Attorney General, proceeded as follows: On May 12, 1988, the two psychologists, Ellis and Porecki, filed a notice of appeal. R. 70. On September 29, 1988, Ellis and Porecki, joined by the other State employees, moved to withdraw these appeals, stating "[we] move this Court . . . to proceed with Appellant's Pro Se Appeal filed on or about March 22, 1988." Joint Appendix filed in the Fourth Circuit at 133. They further declared that they "[stood] ready to

defend the appeal filed in Pro Se by Appellant William Lewis Smith." *Id*. On November 7, 1988, the Fourth Circuit dismissed the appeals filed by the State employees. *Id*. at 134.

On August 2, 1989, the Fourth Circuit appointed counsel for Smith and asked for formal briefing. In addition to the Rule 3(c) issue raised here, Smith argued that: 1) the dismissal of Barry should be vacated because of this Court's ruling in *West v. Atkins*; and 2) the court should reverse the directed verdict in favor of the correctional officers on the deliberate indifference claim for denial of a wheelchair. J.A. 35.

On November 29, 1990, a panel of the Fourth Circuit dismissed Smith's appeal for lack of jurisdiction, finding that his informal brief could not substitute for a notice of appeal. The court noted that Rule 3(c) is "construe[d] . . . liberally, especially when applied to papers filed pro se by an indigent prisoner," and recognized that the Rule's requirements are satisfied:

> "by any statement . . . that clearly evinces the party's intent to appeal" and which "accomplishes the two basic objectives of the Rule 3 notice requirement: (1) to notify the Court of the taking of an appeal; and (2) to notify the opposing party of the taking of the appeal."

J.A. 35 (*quoting Cobb v. Lewis*, 488 F.2d 41, 45 (5th Cir. 1974)).

Yet the Fourth Circuit held that Smith's informal brief could not serve as the "functional equivalent" of a notice of appeal for three reasons. First, the court adopted the position of the Fifth Circuit that a brief may *never*

serve as a notice of appeal, and rejected a contrary holding of the Third Circuit. J.A. 37. Second, the court also found that the informal brief could not serve as a notice of appeal because Smith's brief was not "initiate[d]" by him, but was merely a response to the court's "Order to Proceed on Informal Brief." J.A. 36. Finally, the court stated that the usual "solicitude afforded to pro se litigants [was] greatly diminished, even if not erased" because Smith's court-appointed attorney, who was not representing him on appeal, wrote Smith a letter advising him that his premature notice of appeal was invalid. J.A. 36.

The Fourth Circuit denied Smith's petition for rehearing and suggestion for rehearing *en banc* on December 26, 1990. J.A. 39. This Court granted Smith's petition for writ of certiorari on June 28, 1991. J.A. 40.

SUMMARY OF ARGUMENT

The court of appeals ruled that a brief may not substitute for a notice of appeal even if it otherwise meets the requirements of Rules 3 and 4 of the Federal Rules of Appellate Procedure. J.A. 37. This conclusion is contrary to the plain language of Rule 3(c), the Notes of the Advisory Committee on Appellate Rules ("Advisory Committee Notes"), and this Court's decisions.

Rule 3(c) provides that "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal." As the Advisory Committee Notes indicate, the drafters intended that any document manifesting an intent to appeal should be considered a valid notice of

appeal: "In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with. . . . The proposed amendment would give recognition to this practice." App. 3.

The Fourth Circuit accepted this "functional equivalence" approach, but reasoned that the appellate rules require that the notice of appeal and the brief be separate documents. J.A. 35-37. This reasoning has no support in the language of the rules. The functional equivalence standard permits any document to fulfill its stated purpose and also serve the function of a notice of appeal. When one document serves two purposes, no requirement under the rules is circumvented.

Further, this Court's decisions direct the courts of appeals to take "a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal . . . to preserve the jurisdiction of the Courts of Appeals." *Coppedge v. United States*, 369 U.S. 438, 442 n.5 (1962). Nor is this "liberal view" limited to pro se pleadings. In *Foman v. Davis*, 371 U.S. 178, 181 (1962), this Court reversed a decision dismissing an appeal because the notice of appeal designated the wrong ruling appealed from. More recently, this Court reaffirmed *Foman*'s liberal approach and held that functional equivalence is the correct standard to use when measuring compliance with Rule 3(c)'s requirements. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17 (1988). The Fourth Circuit's refusal to consider any brief as the functional equivalent of a notice of appeal cannot be reconciled with these decisions.

In this case, because Smith's informal brief manifested his intent to appeal and otherwise complied with the requirements of Rule 3, it perfected his appeal. The informal brief was: 1) timely filed; 2) served on all parties to the litigation; and 3) identified the court, the party appealing and the judgment appealed from. Read alone, or in context with his prematurely-filed notice of appeal, Smith's informal brief clearly evinced his intent to appeal.

Moreover, the pleadings submitted by the other parties demonstrate that they had a clear understanding that Smith wished to appeal the final judgment entered by the district court. In this situation, there is no prejudice to any of the parties arising from the deficiencies in Smith's "notice of appeal," and the court of appeals should have accepted jurisdiction and decided the case on its merits.

ARGUMENT

I. ANY DOCUMENT THAT IS THE FUNCTIONAL EQUIVALENT OF A NOTICE OF APPEAL PERFECTS JURISDICTION IN THE COURT OF APPEALS

The court of appeals ruled that "an appellate brief will not substitute for a notice of appeal, even if it otherwise meets the requirements of Fed. Rules App. P. 3 and 4." J.A. 37. The disqualification of an entire class of documents from eligibility as notices of appeal is contrary to the plain language of the Rule, the Advisory Committee Notes, and this Court's decisions.

A. Rule 3(c) and the Advisory Committee Notes require courts to look for functional equivalence, not literal compliance, when assessing whether jurisdiction over an appeal has been perfected

When faced with a question concerning the interpretation of a federal rule, the analytical starting point is an examination of the language of the Rule. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 350 (1981) (when interpreting rule "answer is dictated by the plain language, the purpose, and the history" of the rule); *see also Schiavone v. Fortune*, 477 U.S. 21, 30 (1986) (in interpreting rule, "[w]e accept the Rule as meaning what it says").

Rule 3(c) provides as follows:

Rule 3. Appeal as of Right – How Taken

. . . .

> **(c) Content of the Notice of Appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

That no particular significance attaches to any separate document titled "notice of appeal" is evident from the final sentence of the Rule. This sentence was added in 1979.[4] It stands as a straightforward admonition:

[4] The new sentence was part of a set of amendments to the Federal Rules of Appellate Procedure that "were designed to

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"informality of form or title" shall not serve as a jurisdictional bar to an otherwise timely filed appeal.

Any doubt about Rule 3(c)'s meaning is dispelled by the Advisory Committee Notes, which are " 'of weight' " when interpreting a rule. *Schiavone*, 477 U.S. at 31 (*quoting Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946)). The general note accompanying Rule 3 states that the Rule is not to be strictly construed. It provides that "decisions . . . which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules [Rules 3 and 4]." Rule 3 Advisory Committee's Note. As examples of these earlier decisions, the note quotes from *Coppedge v. United States*, 369 U.S. 438 (1962), where this Court observed that "a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, has been

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remove pitfalls in the appellate process and make the process of appealing a judgment easier." Adams, *The Timing of Appeals Under Rule 4(a)(4) of the Federal Rules of Appellate Procedure*, 123 F.R.D. 371, 375 (1988). The 1979 amendments to Rule 4 of the Federal Rules of Appellate Procedure ("Rule 4"), governing the timing of appeals, evinced a similar intent to "remove pitfalls in the appellate process." For example, Rule 4(a)(2) was added in 1979: "Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." In addition, the "good cause" language of Rule 4(a)(5) was added in order to "expand[ ] to some extent the standard for the grant of an extension of time." Rule 4(a)(5) advisory committee's note. Also, Rule 4(a)(1) was amended to permit an appeal to proceed even if the notice of appeal was filed in the circuit court as opposed to the district court.

used to preserve the jurisdiction of the Courts of Appeals." *Id.* at 442 n.5.[5]

The drafters' understanding of the criteria of "equivalen[ce]" is set out in the note explaining the 1979 amendment to Rule 3(c). This note begins by pointing out the harsh jurisdictional consequences of an untimely filed notice of appeal and then states that the 1979 amendment was thought necessary in order to narrow the scope of this jurisdictional bar:

> it is important that the right to appeal not be lost by mistakes of mere form. In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with. See, e.g., *Cobb v. Lewis*, (CA5th, 1974) 488 F.2d 41; *Holley v. Capps* (CA5th, 1972) 468 F.2d 1366. The proposed amendment would give recognition to this practice.

Rule 3(c) Advisory Committee's Note. As the note explains, the chief criterion in assessing "equivalen[ce]" is simply whether "a paper" has been filed which evinces a party's intent to appeal. If such "a paper" has been filed, the "substance" of the Rule has been satisfied.

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[5] The Advisory Committee Note also cites *Fallen v. United States*, 378 U.S. 139 (1964). There, in reversing a determination that Rule 37(a) of the Federal Rules of Civil Procedure required in each and every case that a notice of appeal be in the hands of the clerk before the 10th day, this Court stated that "the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances." *Id.* at 142.

The Advisory Committee's citation to *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974), as one of "a number of decided cases" illustrative of this practice is also informative.[6] There, the Fifth Circuit ruled that a plaintiff's petition for leave to appeal under 28 U.S.C. § 1292(b) satisfied the requirement for a notice of appeal. The court reached this conclusion after examining the numerous types of documents which other courts have held satisfy the notice of appeal function, stating that:

> These cases teach that the notice of appeal requirement may be satisfied by any statement, made either to the district court or to the Court of Appeals, that clearly evinces the party's intent to appeal. Such a statement accomplishes the two basic objectives of the Rule 3 notice requirement: (1) to notify the Court of the taking of an appeal; and (2) to notify the opposing party of the taking of the appeal.

Cobb, 488 F.2d at 45.

Among the cases cited by the *Cobb* court as "teach[ing] that the notice of appeal requirement may be satisfied by any statement . . . that clearly evinces the party's intent to appeal" was *Frace v. Russell*, 341 F.2d 901 (3d Cir.), *cert. denied*, 382 U.S. 863 (1965). In *Frace*, the requirement of a notice of appeal was found satisfied by a "Brief for Appeal" filed in the court of appeals. *Id.* at 903. The Advisory Committee's citation to *Cobb* thus takes on

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[6] One of the generally accepted canons of construction is that an "amended statute should be interpreted in light of the court decisions that . . . prompted the amendment." 1A N. Singer, *Sutherland Statutory Construction* § 22.29, at 263 (4th ed. 1985).

added significance in the present case because *Cobb* endorsed the view that a brief could serve as a party's notice of appeal.

The Fourth Circuit, however, declined to take a liberal view of Smith's appellate brief. In its view, the Federal Rules of Appellate Procedure envision the notice of appeal and the appellate brief as two separate filings: "To collapse the two into one would . . . eliminate entirely the requirement for the filing of a notice of appeal." J.A. 37.[7] This conclusion has no support in the language of the rules. The existence of separate provisions suggests only that in the typical case, an appellant will file a notice of appeal shortly after final judgment is entered, and prepare a brief sometime later. That this sequence of events does not always take place, however, is inconsequential. There is no provision in the rules dictating that one document may not serve two purposes and, as discussed *infra*, the federal courts have long held that a single document may serve two purposes under the rules.

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[7] The Fourth Circuit, in reaching this conclusion, relied on the Fifth Circuit's decision in *United States v. Cooper*, 876 F.2d 1192, 1196 (5th Cir. 1989), and the Eleventh Circuit's decision in *Florida Women's Medical Clinic, Inc. v. Smith*, 706 F.2d 1172, 1173 (11th Cir. 1983). The reliance on the Eleventh Circuit's decision is misplaced. In *Finch v. City of Vernon*, 845 F.2d 256, 259 (11th Cir. 1988) (per curiam), the Eleventh Circuit ruled that a pro se brief could substitute as a notice of appeal where it was "quite clear that [appellants] intended to appeal" from the judgment below.

B. The decisions of this Court interpreting Rule 3(c) consistently hold that its provisions are to be construed liberally in favor of preserving jurisdiction

This Court, when defining the proper standard of review for applications to proceed *in forma pauperis*, approved decisions that applied a functional equivalence approach to all manner of documents. *Coppedge v. United States*, 369 U.S. 438, 442 (1962). In *Coppedge*, this Court noted that because the federal courts had taken "a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal," *id.* at 442 n.5, these defendants generally experience "no material difficulty in filing a timely notice of appeal," *id.* at 442. Applying this "liberal" approach, the federal courts have ruled that all manner of documents can serve their intended purpose and also serve as a notice of appeal.[8]

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[8] In *Coppedge*, this Court cited numerous cases that allowed various types of documents to substitute as notices of appeal. *Coppedge*, 369 U.S. at 442 n.5. Other documents that have been accepted by the federal courts since *Coppedge* as the equivalents of notices of appeal include the following: *Trevino-Barton v. Pittsburgh Nat'l Bank*, 919 F.2d 874, 877 (3d Cir. 1990) (alternate holding) (civil appeal information sheet); *United States v. Christoph*, 904 F.2d 1036, 1040 (6th Cir. 1990) (motion for enlargement of time), *cert. denied*, 111 S. Ct. 713 (1991); *Dura Systems, Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551, 555 (3d Cir. 1989) (consent order), *cert. denied*, 110 S. Ct. 844 (1990); *In re Bertoli*, 812 F.2d 136, 138 (3d Cir. 1987) (motion for the certification of an interlocutory appeal); *San Diego Committee Against Registration & Draft (CARD) v. Governing Bd. of Grossmont Union High School Dist.*, 790 F.2d 1471, 1474 (9th Cir. 1986) (motion for permission to appeal order pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure); *United States v.*

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Nor is this approach restricted to cases involving pro se appellants.[9] In *Foman v. Davis*, 371 U.S. 178 (1962), a contract action, this Court addressed the requirement that a notice of appeal contain a designation of the judgment appealed from.[10] *Foman* made it plain that the notice of appeal provision should not be so narrowly construed as to ignore its simple purpose:

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Whitaker, 722 F.2d 1533, 1534-35 (11th Cir. 1984) (motion for release pending appeal); *Yates v. Mobile County Personnel Bd.*, 658 F.2d 298, 299 (5th Cir. Unit B 1981) (per curiam) ("Petition for Supervisory Writ of Mandamus and Certiorari"); *Laser Alignment, Inc. v. ICM of the Carolinas, Inc.*, 32 Fed. R. Serv. 2d 776, 778-79 (4th Cir. 1981) (unpub. op.) (statement of issues filed pursuant to Rule 10(b)(3) of the Federal Rules of Appellate Procedure); *Cobb v. Lewis*, 488 F.2d 41, 44-46 (5th Cir. 1974) (petition to file interlocutory appeal).

Several courts of appeals have held that an appellate brief may satisfy the notice of appeal provision. *See Allah v. Superior Court of State of California*, 871 F.2d 887, 889-90 (9th Cir. 1989) (concluding that brief may serve as a notice of appeal); *Finch v. City of Vernon*, 845 F.2d 256, 259-60 (11th Cir. 1988) (per curiam) (same); *Frace v. Russell*, 341 F.2d 901, 903 (3d Cir.) (same), *cert. denied*, 382 U.S. 863 (1965). *But see Jurgens v. McKasy*, 905 F.2d 382, 385 n.4 (Fed. Cir. 1990) (appellate brief may not serve as notice of appeal); *United States v. Cooper*, 876 F.2d 1192, 1196 (5th Cir. 1989) (same).

[9] *See* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3949, at 357 n.7 (1977) (collecting cases supporting proposition that " 'liberal view' is not necessarily limited to papers filed by indigent defendants").

[10] The *Foman* Court was interpreting Rule 73(b) of the Federal Rules of Civil Procedure ("Rule 73(b)"), which is Rule 3(c)'s predecessor. The provisions of Rule 73(b) were incorporated into Rule 3(c) without substantive change.

> The defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions [to vacate the judgment and to amend the complaint] as an effective, although inept, attempt to appeal from the judgment sought to be vacated.

Id. at 181. *Foman's* message is direct: an appeal shall not be dismissed where the party's intent to appeal a judgment is clear and the other parties to the appeal are not prejudiced by the deficiencies in the notice of appeal.[11]

More recently, in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), this Court reaffirmed *Foman's* liberal approach to Rule 3(c) and held that functional equivalence is the correct measure of compliance:

> We do not dispute the important principle for which *Foman* stands – that the requirements of

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[11] Indeed, even before *Foman*, this Court made it clear that courts were not to divest themselves of jurisdiction through "hypertechnical" interpretations of notices of appeal. In *Hoiness v. United States*, 335 U.S. 297 (1948), this Court interpreted a since-repealed statute which stated, *inter alia*, that "[n]o . . . proceedings in civil causes . . . shall be abated . . . for any defect or want of form." *Id.* at 300 n.6. In reversing the dismissal of the case, this Court stated that "[i]t seems to us hypertechnical to say that the appeal papers did not bring the sole issue of the case fairly before the Court of Appeals. . . . The failure to use the words August 5, 1946, if that be taken as the date of the final decision, was as insubstantial as a misspelling of the words would have been, since the words used identified the rulings which were challenged, and in no way altered the scope of review." *Id.* at 301.

> the rules of procedure should be liberally construed and that "mere technicalities" should not stand in the way of consideration of a case on its merits. Thus, if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires.

Id. at 316-17 (citation omitted). The *Torres* Court, however, held that the complete absence of Torres's name from the notice of appeal filed by the 15 other appellants prevented a finding that Rule 3(c), "even liberally construed," was satisfied. *Id.* at 317. Permitting an appeal in Torres's name to move forward under those circumstances, this Court concluded, would prejudice the other parties to the appeal: there must be "some designation that gives fair notice of the specific individual or entity seeking to appeal." *Id.* at 318.

The Fourth Circuit's blanket exclusion of briefs from the functional equivalence approach cannot be squared with the liberal approach to Rule 3(c) required by *Coppedge*, *Foman*, and *Torres*. As these decisions make clear, to perfect jurisdiction a party need only file a document within the appropriate time period, which, liberally construed, complies with Rule 3(c). Thus, the *Foman* Court, while assuming the "ineffectiveness of the first" notice of appeal, nonetheless found the second notice to be valid, although it identified the wrong order being appealed from and thus, strictly speaking, was not in compliance with Rule 3(c). *Foman*, 371 U.S. at 181; *see also Sanabria v. United States*, 437 U.S. 54, 67 n.21 (1978) (dicta) ("A mistake in designating the judgment appealed from is not

always fatal, so long as the intent to appeal from a specific ruling can fairly be inferred by probing the notice and the other party was not misled or prejudiced.").

Since *Foman*, the courts of appeals have taken a liberal approach when interpreting Rule 3(c)'s requirements. For example, it is not uncommon for lawyers, as well as pro se litigants, to make mistakes when designating the judgment or order appealed from. The courts have consistently construed this requirement liberally to prevent jurisdiction from being defeated. In this regard, the following statement from the Fifth Circuit is typical: "[f]ailure to properly designate the order appealed from is not a jurisdictional defect, and may be cured by an indication of intent in the briefs or otherwise." *United States v. Rochester*, 898 F.2d 971, 976 n.1 (5th Cir. 1990).[12]

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[12] *See also Williams v. Guzzardi*, 875 F.2d 46, 49 (3d Cir. 1989) ("We have appellate jurisdiction over orders not specified in the notice of appeal if there is a connection between the specified and unspecified order, the intention to appeal the unspecified order is apparent and the opposing party is not prejudiced and has a full opportunity to brief the issues."); *Grubb v. Federal Deposit Ins. Corp.*, 868 F.2d 1151, 1154 n.4 (10th Cir. 1989) ("When a party files a notice of appeal that is technically defective because it designates the appeal as from the denial of a motion for judgment n.o.v. or for a new trial, we may treat the appeal as taken from the final judgment if the appeal is otherwise proper, the intent to appeal from the final judgment is clear, and the opposing party was not misled or prejudiced."); *McAninch v. Trader's Nat'l Bank*, 779 F.2d 466, 467 n.2 (8th Cir. 1985) (single notice of appeal filed in consolidated appeal held to be sufficient even though it did not specify an appeal from order granting summary judgment or an order dismissing one party from the action: "there is a policy of

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The courts of appeals have accepted all manner of inexact designations as satisfying the Rule. *See, e.g., Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1456 n.1 (9th Cir. 1983) ("We assume jurisdiction over both the age discrimination and national origin discrimination claims even though Haddad's notice of appeal states that appeal is taken from a 'judgment on the verdict,' and thus might be technically interpreted to refer only to the age discrimination claim decided by the jury."); *United States v. Christoph*, 904 F.2d 1036, 1040 (6th Cir. 1990) (motion for enlargement of time held to be valid notice of appeal since the "motion named the parties, specified the court being appealed to, and gave the case number in the lower court . . . [which] is all that is required by [Rule] 3(c)"), *cert. denied*, 111 S. Ct. 713 (1991).

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liberal construction of notices of an appeal in situations where intent is apparent and there is no prejudice to the adverse party"), *cert. denied*, 476 U.S. 1182 (1986); *Cardoza v. Commodity Futures Trading Comm'n*, 768 F.2d 1542, 1546 (7th Cir. 1985) ("The general rule which has developed is that an error in designating the judgment or a part thereof will not result in a loss of appeal if the intent to appeal from the judgment complained of may be inferred from the notice and if the appellee has not been misled by the defect."); *Incas & Monterey Printing & Packaging, Ltd. v. M/V Sang Jin*, 747 F.2d 958, 963 n.15 (5th Cir. 1984) ("The requirement of F.R.App.P. 3(c) that a notice of appeal designate the judgment from which it is taken is not to be so strictly construed as to defeat an appeal where appellant's overriding intent to appeal is clear."), *cert. denied sub nom.* 471 U.S. 1117 (1985); *Vargas v. McNamara*, 608 F.2d 15, 21 (1st Cir. 1979) ("While plaintiffs made a technical error in their notices of appeal [by failing to designate final judgment], there was never any doubt as to the subject matter of the appeal.").

These decisions recognize that the essential purpose of a notice of appeal is to announce the appellant's intention to appeal. It neither assigns specific error nor puts forth legal arguments. Its function is straightforward: it requires parties to announce whether or not they will appeal a judgment or order within a fixed period of time. When the intent to appeal is understood, liberal construction of the Rule 3(c) requirements does not prejudice other parties. As such, liberal construction of Rule 3(c) " 'reject[s] the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept[s] the principle that the purpose of pleading is to facilitate a proper decision on the merits.' " *Foman*, 371 U.S. at 181-82 (*quoting Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

II. SMITH'S INFORMAL BRIEF IS THE FUNCTIONAL EQUIVALENT OF A NOTICE OF APPEAL BECAUSE IT SATISFIED THE REQUIREMENTS OF RULE 3(C), WAS TIMELY FILED, AND PUT THE COURT AND THE OTHER PARTIES ON NOTICE OF SMITH'S INTENT TO APPEAL THE JUDGMENT ENTERED AGAINST HIM

Rule 3(c) requires a party taking an appeal to: 1) specify the party taking the appeal; 2) name the court to which the appeal is taken; and 3) designate the judgment, order or part thereof appealed from. Smith's informal brief satisfied these requirements.[13] First, Smith's signature on the brief identified him as the party taking the

---

[13] The Fourth Circuit noted the issue but did not decide whether Smith's informal brief adequately designated the judgment appealed from. J.A. 37 n.7.

appeal. J.A. 25. Moreover, because no other individuals had been joined as plaintiffs in the district court case, there could be no doubt that the term "plaintiff" used in the brief referred to Smith.

Second, the brief clearly designated the court to which the appeal was taken: "United States Court of Appeals for the Fourth Circuit" was printed at the top of the first page of the brief. J.A. 23. Also, the document contained answers to questions posed by the Fourth Circuit "about the appeal," clearly evincing Smith's intent to appeal the district court's ruling to the Fourth Circuit. J.A. 23.

Finally, while Smith did not specify the judgment appealed from, the informal brief did include the docket number from his district court case, and contained statements manifesting his intent to appeal the final judgment entered by the district court. In response to the question, "What action do you want the Court to take in this case?," Smith requested, *inter alia*, a "new trial on all issues triable by Jury," J.A. 24, and asked the court to "review all evidence pretaining [sic] to his case, and the award of damages which plaintiff do beleave [sic] was grossly inadequate." J.A. 25. However inartful Smith's other answers to the questions posed by the court may have been, these responses clearly evinced Smith's intent to appeal the district court's judgment.[14]

---

[14] The conclusion reached below – that "the normal solicitude afforded to pro se litigants [was] greatly diminished," J.A. 36, because Smith's trial counsel sent him a letter indicating that his first notice of appeal was premature – is incorrect. In

(Continued on following page)

Moreover, as discussed above, this Court and the courts of appeals have permitted appeals to proceed even though the notice of appeal incorrectly identifies the order or judgment appealed from. *See supra* pp. 19-21 & n.12. Even if Smith had included the date final judgment was entered in a notice of appeal, that date would not have provided the other parties with any significant, additional information. The parties would not have been able to discern from the notice of appeal precisely what issues Smith would raise in a formal brief if formal briefing were ordered by the Fourth Circuit. And, because an appeal from a final judgment subsumes all prior, non-final orders entered in the case, Smith would not have been required to list the date of every order which he planned to appeal, but would only be required to list the final judgment. *See, e.g., Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 858 (3d Cir. 1990) (because only a final judgment or order is appealable, the appeal from a final judgment draws in question all prior non-final orders and rulings); *see also* 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶203.17[2], at 3-87 (2d ed. 1991) (same).

(Continued from previous page)

general, pro se appeals, such as Smith's, are viewed liberally. *See Coppedge*, 369 U.S. at 442 n.5. Smith's pleadings should be treated with solicitude because there was no genuine attorney-client relationship when he filed his notice of appeal. Smith's attorney had already made it clear that he would no longer represent Smith if he proceeded with an appeal. J.A. 17. Given the instructions Smith had received from the Fourth Circuit to file an informal brief, it is entirely understandable that Smith would disregard his former attorney's letter advising him that his appeal was a nullity. This is particularly true in view of Barry's submission of an informal brief.

In addition to complying with Rule 3(c), Smith's informal brief satisfied the other essential requirement of a valid notice of appeal: it was timely filed. The Federal Rules of Appellate Procedure require that a notice of appeal be filed within 30 days after the date of entry of the order disposing of a motion for judgment notwithstanding the verdict. Fed. R. App. P. 4(a) (1), (4). Smith's brief was filed with the Fourth Circuit on May 4, 1988, 20 days after the district court entered an order denying Ellis's and Porecki's motion for judgment notwithstanding the verdict and well within the required timeframe.[15]

While Smith's informal brief, standing alone, was sufficient to put the court and the other parties on notice of his intent to appeal, it must not be analyzed in the abstract. This Court has held that it is appropriate to consider a notice of appeal filed prematurely to determine whether the other parties understood the appellant's intent to file an appeal. *Foman*, 371 U.S. at 181. When an untimely-filed notice of appeal is rendered a nullity under Rule 4(a)(4), the premature notice of appeal may still be considered in assessing whether the second document filed satisfies the purpose of Rule 3(c):

> This resort to the defective notice of appeal neither transgresses nor undermines the unequivocal proscription of Rule 4(a)(4). We

---

[15] In addition, Smith's informal brief was served on all of the parties. Rule 3(d) contemplates that the district court clerk's office will serve notice of the filing of a notice of appeal by mailing a copy of the notice to counsel of record for each party. In the present case, Smith himself performed this function by mailing his informal brief to counsel of record for each party. J.A. 25.

> read that rule as a command that a prematurely-filed notice of appeal is not viable, and not as a barrier to its recognition simply as a source of information serving opposing parties and the court alike.

Nichols v. Board of Trustees of the Asbestos Workers Local 24 Pension Plan, 835 F.2d 881, 889 n.74 (D.C. Cir. 1987).

Here, as in *Nichols*, the other parties' responses to Smith's defective notice of appeal and his informal brief demonstrate that they understood Smith's intent and were prepared to defend against the appeal. The State employees specifically acknowledged that Smith was taking an appeal and stated that they were prepared to defend against it. They filed a motion on September 29, 1988, requesting that they be allowed to withdraw voluntarily their own appeal of the district court's decision to deny their motion for judgment notwithstanding the verdict. Joint Appendix filed in the Fourth Circuit at 132-33. In this motion, they acknowledged Smith's appeal by stating "[We] move . . . to proceed with Appellant's Pro Se Appeal," and affirmed that they stood "ready to defend the appeal filed in Pro Se by Appellant William Lewis Smith." *Id.* at 133. Moreover, in their brief to the Fourth Circuit, the State employees acknowledged that "[s]urely, Appellees were aware that the Appellant intended to appeal by reason of the filing of his premature notice of appeal and proceeded thereafter in accordance with court instructions." Fourth Circuit Brief for Appellees at 10 n.3.

Similarly, Barry indicated by his actions that he both understood Smith's intent and was prepared to defend against the appeal. Barry filed an informal brief on April

28 in response to Smith's premature appeal. J.A. 19-22. Because the only issue involving Barry was whether the district court properly dismissed him from the case, Barry only needed to know that Smith filed an appeal to determine how to respond. Barry's informal brief asked the Fourth Circuit to affirm the district court's decision dismissing him under *Calvert*, and did not mention any defect in Smith's notice of appeal.

About two months after Barry filed his informal brief, this Court decided *West v. Atkins*, which overruled *Calvert*. Barry then filed a supplement to his brief on June 24 claiming that, notwithstanding *West*, his dismissal from the case should be affirmed because "no appeal from the December 26, 1984 Order of Dismissal was taken by the plaintiff." J.A. 28. Barry argued that, because Smith's notice of appeal identified the order from which Smith was appealing as the order entered on March 15, 1988, and not the order entered on December 26, 1984 dismissing Barry, the propriety of Barry's dismissal was not properly before the Fourth Circuit. J.A. 28. Barry's supplement again did not indicate that Smith's notice of appeal was premature.

Regardless of the substance of Barry's informal and supplemental briefs, the critical point is that Barry's response demonstrates that he recognized Smith's intent to appeal his dismissal from the case. It is apparent that Barry's belated interest in the technical requirements of Rule 3(c) was prompted by this Court's decision in *West*, which overruled the case he relied on to obtain dismissal from the action.

Because all of the opposing parties clearly recognized Smith's intent to appeal, they cannot claim that a decision

allowing Smith's informal brief to serve also as a notice of appeal would prejudice them because they were not prepared to defend Smith's appeal. In the absence of prejudice, however, this Court has held that jurisdiction is perfected when the appellant has filed a timely, but technically deficient, notice of appeal. *Compare Foman*, 371 U.S. at 181 (allowing technically defective notice of appeal because defect did not mislead or prejudice defendant) *with Torres*, 487 U.S. at 317-18 (disallowing notice of appeal which never designated petitioner as party to action because allowing it would have left appellee and Court uncertain of binding effect of adverse ruling on petitioner). Because neither Barry nor the State employees were misled by the defects in Smith's notice of appeal and informal brief, this Court should recognize Smith's brief as a valid notice of appeal.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed, and the case should be remanded for consideration of petitioner's appeal.

Respectfully submitted,

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APPENDIX

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 3. Appeal as of Right – How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.

* * *

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

* * *

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

1967 Note

General Note. Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is "mandatory and jurisdictional," United States v. Robinson, 361 U.S. 220, 224, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), compliance with the provisions of those rules is of the utmost importance. But the proposed rules merely restate, in modified form, provisions now found in the civil and criminal rules (FRCP 5(e), 73 [Rules 5(e) and 73, Federal Rules of Civil Procedure, this title]; FRCrP 37 [rule 37, Federal Rules of Criminal Procedure, Title 18, Crimes and Criminal Procedure)], and decisions under the present rules which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules. Illustrative decisions are: Fallen v. United States, 378 U.S. 139, 84 S.Ct. 1689, 12 L.Ed.2d 760 (1964) (notice of appeal by a prisoner, in the form of a letter delivered, well within the time fixed for appeal, to prison authorities for mailing to the clerk of the district court held timely filed notwithstanding that it was received by the clerk after expiration of the time for appeal; the appellant "did all he could" to effect timely filing); Richey v. Wilkins, 335 F.2d 1 (2d Cir. 1964) (notice filed in the court of appeals by a prisoner without assistance of counsel held sufficient); Halfen v. United States, 324 F.2d 52 (10th Cir. 1963) (notice mailed to district judge in time to have been received by him in normal course held sufficient); Riffle v. United States, 299 F.2d 802 (5th

Cir. 1962) (letter of prisoner to judge of court of appeals held sufficient). Earlier cases evidencing "a liberal view of papers filed by indigent and incarcerated defendants" are listed in Coppedge v. United States, 369 U.S. 438, 442, n. 5, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

* * *

1979 AMENDMENT

Note to Subdivision (c). The proposed amendment would add the last sentence. Because of the fact that the timely filing of the notice of appeal has been characterized as jurisdictional (See, e.g., *Brainerd v. Beal* (CA7th, 1974) 498 F.2d 901, in which the filing of a notice of appeal one day late was fatal), it is important that the right to appeal not be lost by mistakes of mere form. In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with. See, e.g., *Cobb v. Lewis* (CA5th, 1974) 488 F.2d 41; *Holley v. Capps* (CA5th, 1972) 468 F.2d 1366. The proposed amendment would give recognition to this practice.

When a notice of appeal is filed, the clerk should ascertain whether any judgment designated therein has been entered in compliance with Rules 58 and 79(a) of the F.R.C.P. See Note to Rule 4(a)(6), *infra*.

* * *

Rule 4. Appeal as of Right – When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

* * *

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any

other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

* * *

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7111, 102 Stat. 4419.)

* * *

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

* * *

1979 AMENDMENT

* * *

Subdivision (a)(2). The proposed amendment to Rule 4(a)(2) would extend to civil cases the provisions of Rule 4(b), dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely. Despite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held premature appeals effective. See, e.g., Matter of Grand Jury Empanelled Jan. 21, 1975, 541 F.2d 373 (3d Cir. 1976); Hodge v. Hodge, 507 F.2d 87 (3d Cir. 1976); Song Jook Suh v. Rosenberg, 437 F.2d 1098 (9th Cir. 1971); Ruby v. Secretary of the Navy, 365 F.2d 385 (9th Cir. 1966); Firchau v. Diamond Nat'l Corp., 345 F.2d 269 (9th Cir. 1965).

The proposed amended rule would recognize this practice but make an exception in cases in which a post trial motion has destroyed the finality of the judgment. See Note to Rule 4(a)(4) below.

Subdivision (a)(4). The proposed amendment would make it clear that after the filing of the specified post trial motions, a notice of appeal should await disposition of the motion. Since the proposed amendments to Rules 3, 10, and 12 contemplate that immediately upon the filing of the notice of appeal the fees will be paid and the case docketed in the court of appeals, and the steps toward its disposition set in motion, it would be undesirable to proceed with the appeal while the district court has

before it a motion the granting of which would vacate or alter the judgment appealed from. See, e.g., Keith v. Newcourt, 530 F.2d 826 (8th Cir. 1976). Under the present rule, since docketing may not take place until the record is transmitted, premature filing is much less likely to involve waste effort. See, e.g. Stockes v. Peyton's Inc., 508 F.2d 1287 (5th Cir. 1975). Further, since a notice of appeal filed before the disposition of a post trial motion, even if it were treated as valid for purposes of jurisdiction, would not embrace objections to the denial of the motion, it is obviously preferable to postpone the notice of appeal until after the motion is disposed of.

The present rule, since it provides for the "termination" of the "running" of the appeal time, is ambiguous in its application to a notice of appeal filed prior to a post trial motion filed within the 10 day limit. The amendment would make it clear that in such circumstances the appellant should not proceed with the appeal during pendency of the motion but should file a new notice of appeal after the motion is disposed of.

Subdivision (a)(5).

* * *

The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires a "showing of excusable neglect." While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case "good cause," which is the standard that is applied in the

granting of other extensions of time under Rule 26(b) seems to be more appropriate.

APPENDIX OF FORMS

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____

File Number _____

A. B., Plaintiff	)	
	)	Notice of Appeal
v.	)	
C. D., Defendant	)	

Notice is hereby given that C.D., defendant above named, hereby appeals to the United States Court of Appeals for the ___ Circuit (from the final judgment) (from the order (describing it)) entered in this action on the ___ day of ___, 19___.

(S) _____

_____

(Address)
Attorney for C.D.

UNITED STATES COURT OF APPEALS –
FOURTH CIRCUIT

Rule 34(b). Informal Briefs

Whenever an application for a certificate of probable cause from the denial of a writ of habeas corpus or an appeal taken from the denial of a motion under 28 U.S.C. § 2255, or any pro se appeal, shall be filed, the Clerk shall notify the appellant that he may file, within twenty-one days after receipt of such notice, an informal brief, describing the grounds upon which he claims he is entitled to relief and setting forth the merits of his appeal. Any such informal brief filed by any party shall be considered, together with the record and other relevant papers, by the panel to which the proceeding has been referred.

Parties proceeding pursuant to this section shall be provided copies of this local rule by the clerk.

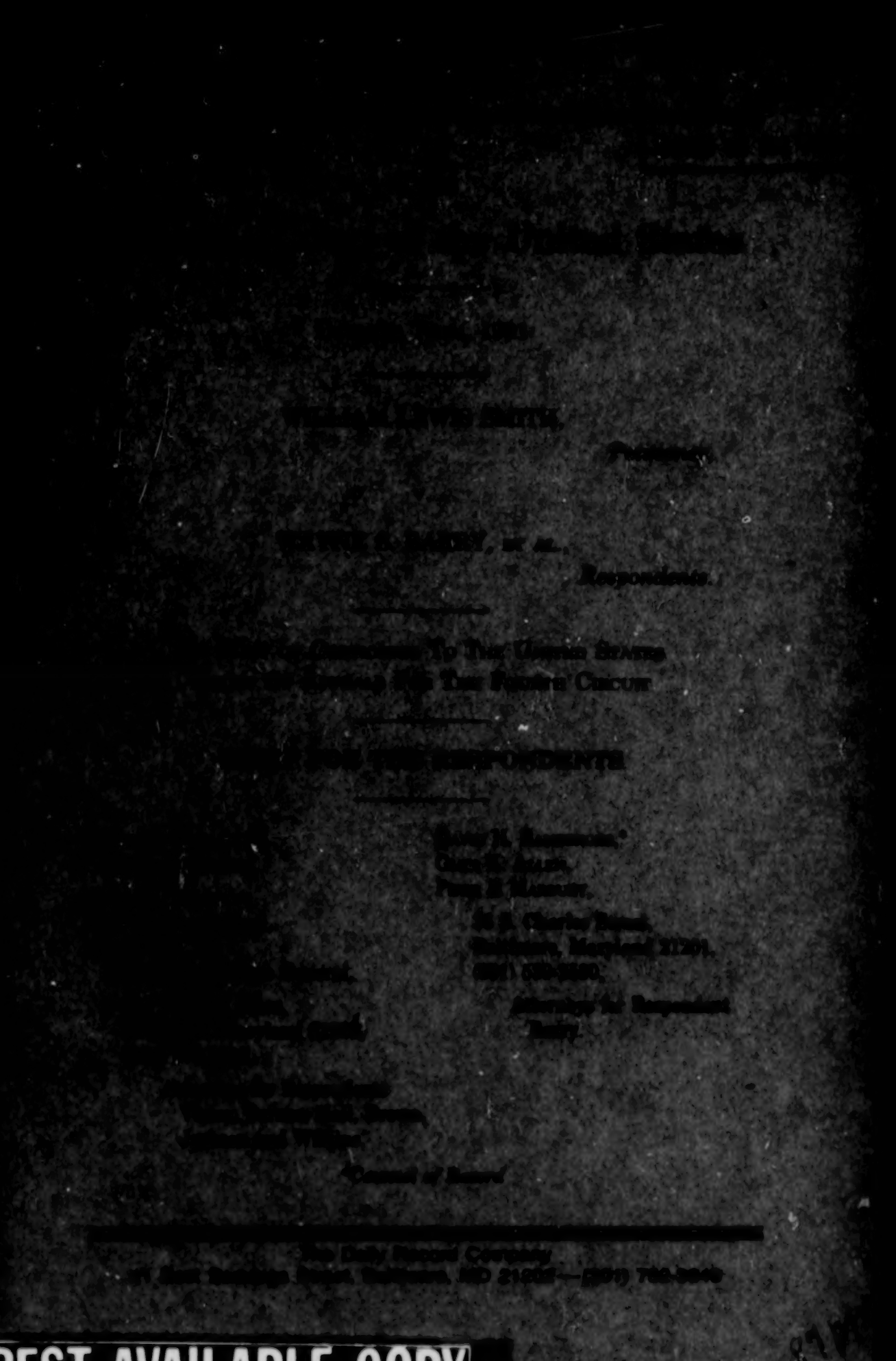
IOP 34.6. Informal Briefs

Local Rule 34(b) has established a procedure for the filing of "informal briefs" in certain cases. The informal brief may be submitted on a form provided by the Clerk and should provide specific information about the case in response to questions appearing on the form. The parties need not limit their briefs solely to the form. It is not necessary to cite cases in an informal brief. An additional supporting memorandum may be submitted if a party deems it necessary in order to address adequately the issues raised. Two copies of the brief and memorandum, if any, must be filed with the Court and a copy mailed to opposing counsel.

Once an informal briefing schedule has been established the parties may file a formal brief only with the permission of the Court. The Court initially reviews cases that are informally briefed under its procedures set forth in Local Rule 34(a) pertaining to pre-argument review. The Court does not limit its review to the issues raised in informal briefs, but reviews the entire record on appeal for possible meritorious issues.

IOP 46.5. Proceeding Pro Se

An individual may proceed without the aid of counsel, but should so inform the Court at the earliest possible time. In any pro se appeal, the Clerk shall notify the parties that they shall file informal briefs as provided by Local Rule 34(b). The Court will independently review the record for meritorious claims and will also consider the need for the appointment of counsel when reviewing the appeal under Local Rule 34(a). Cases involving pro se litigants are ordinarily not scheduled for oral argument.



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QUESTION PRESENTED FOR REVIEW

Whether an "Informal Brief" filed by a pro se litigant pursuant to instructions from the Clerk of the Fourth Circuit Court of Appeals may serve a dual function as a notice of appeal?

LIST OF PARTIES TO PROCEEDING BEFORE FOURTH CIRCUIT COURT OF APPEALS

William Lewis Smith, petitioner, was appellant in the appeal before the Fourth Circuit. Respondents Dr. Wayne S. Barry and Maryland Division of Corrections Correctional Officers Robert Victor, Arnold Turner, Bobby R. Hall, David Jackson, Robert Brown, and Lakamon Wilkins were appellees in the appeal before the Fourth Circuit.

Other appellees in the appeal before the Fourth Circuit, not parties to the present proceeding, were Jon P. Galley, individually and in his capacity as Commissioner of the Division of Corrections; George H. Collins, individually and in his capacity as Warden

of the Maryland Penitentiary; Commander Captain Carpenter; Robert Ellis, Psychologist, of the Maryland Department of Corrections; and Daniel Porecki, Psychologist, of the Maryland Department of Corrections.

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MISCELLANEOUS

Advisory Committee Notes to 1979 Amendments to the Federal Rules of Appellate Procedure, Note to Rule 1. 15

No. 90-7477

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM LEWIS SMITH,

Petitioner,

v.

WAYNE S. BARRY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

RULES INVOLVED

The pertinent portions of the following rules are reproduced in the appendices to this brief:

1. Rule 3(a), (c) and (d) of the Federal Rules of Appellate Procedure;

2. Rule 4(a) of the Federal Rules of Appellate Procedure;

3. Rule 25(a) of the Federal Rules of Appellate Procedure;

4. Rule 31(a) of the Federal Rules of Appellate Procedures;

5. Form 1 of the Federal Rules of Appellate Procedure;

6. Local Rule 34(b) of the United States Court of Appeals for the Fourth Circuit;

7. Internal Operating Procedure 34.6 of the United States Court of Appeals for the Fourth Circuit;

8. Internal Operating Procedure 46.5 of the United States Court of Appeals for the Fourth Circuit; and

9. 28 U.S.C. § 2074 (1990).

STATEMENT OF THE CASE

Respondents accept petitioner's statement of the case with the following corrections.

First, petitioner's statement of the case does not mention that the Fourth Circuit clerk's office, when it sent blank pre-printed "informal brief" forms to all entities that the clerk's office deemed parties, also sent an "Order to Proceed on Informal Brief." This Order contained instructions as to completing, serving, and filing the informal brief. See Joint Appendix at 11-13; appendix 3 to this brief. The blank informal brief forms and "Order{s} to Proceed on Informal Brief" were sent to the parties on or about April 13, 1988. The "Order to Proceed on Informal Brief" instructed the parties to mail their informal briefs to the court and

to other parties no later than May 4, 1988.

Second, respondents object to the first sentence in the second full paragraph on page 5 of petitioner's statement of the case. This sentence reads: "Barry, represented by counsel, was the first to respond to Smith's appeal: On April 28, 1988, he filed the informal brief form that had been sent to him by the clerk's office." This suggests that Dr. Barry was "respond{ing} to Smith's appeal." In fact, Dr. Barry, like the other respondents, was responding to the Fourth Circuit's "Order to Proceed on Informal Brief."

SUMMARY OF ARGUMENT

Federal Rule of Appellate Procedure 3(a) requires, as a jurisdictional

threshold, the filing of a valid and timely notice of appeal. Mr. Smith did not comply with this requirement. He did file a premature notice of appeal, but, despite being informed by his former attorney that this notice of appeal was void and that he must file a new one, he did not file a new and valid notice of appeal. The Fourth Circuit was thus without jurisdiction to hear Mr. Smith's appeal, unless Mr. Smith submitted a document that was the "functional equivalent" of a notice of appeal. Mr. Smith asserts that the "informal brief" he filed pursuant to instructions from the clerk of the Fourth Circuit was this functional equivalent. There are five reasons why this contention lacks merit.

First, the filing of a notice of appeal and the filing of an appellate brief are separate steps in the

appellate process, each performing a distinct and important function, and each subject to separate detailed requirements in the appellate rules. The appellate rules, accordingly, envision the notice of appeal and the appellate brief as separate filings. To collapse the notice of appeal and appellate brief into a single step would contravene the plain import of the appellate rules.

Second, the functional equivalent doctrine rests, at least implicitly, on the assumption that the content, timing, and choice of recipients of the surrogate notice of appeal reflect the act of the appellant. Under the Fourth Circuit's informal brief procedure, however, the content, timing, and choice of recipients of the informal brief are largely determined by the Fourth Circuit.

Third, the solicitude normally accorded incarcerated pro se litigants is undue in this instance. This solicitude rests on the recognition that incarcerated pro se litigants labor under constraints to which other litigants are not subject; hence, if a pro se litigant does "all he can do" under the circumstances to comply with a requirement, some lenience in interpreting the requirement is appropriate. In this case, however, Mr. Smith did not "do all he could do" to comply with the notice of appeal requirements. Mr. Smith was explicitly informed by his former attorney that his premature notice of appeal was void and that he needed to file a new one. Mr. Smith had abundant time to heed this advice. He did not do so.

Fourth, even were one to assume that Mr. Smith's informal brief may

serve a dual function as a notice of appeal, Mr. Smith has not thereby established appellate jurisdiction. The informal brief must also, as a jurisdictional prerequisite, meet the specificity requirements of Federal Rule of Appellate Procedure 3(c), which requires that, in the case of multiple appealable judgments or orders, a party wishing to appeal must designate from which judgments or orders it is appealing. Mr. Smith's informal brief does not satisfy Rule 3(c)'s requirements.

Finally, Mr. Smith contends that the pleadings submitted by the respondents demonstrate that they understood Smith's wish to appeal and that therefore no prejudice arose from the deficiencies in Smith's notice of appeal. This contention lacks foundation, and in any event would be

legally insignificant. First, the respondents' submission of informal briefs was responsive to instructions from the Fourth Circuit in its "Order to Proceed on Informal Brief" rather than a consequence of adequate notice from Smith regarding his intentions to appeal. Second, and more importantly, Smith's filing of a valid and timely notice of appeal was a jurisdictional requirement. Harmless error analysis is inappropriate. Torres v. Oakland Scavenger Co., 487 U.S. 312, 317 n.3 (1988). The proper focus is on what Smith did or failed to do to perfect his appeal, not on what the other parties might have surmised about Smith's intentions.

Smith in this case did not file a valid notice of appeal or its functional equivalent. The Fourth Circuit therefore lacked appellate jurisdiction,

and its Order dismissing Smith's appeal for lack of jurisdiction should be affirmed.

ARGUMENT

INTRODUCTION

Rule 3(a) of the Federal Rules of Appellate Procedure provides as follows:

> Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any other step than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.

Mr. Smith did not file the timely notice of appeal required by this rule. On March 22, 1988, he did file a notice of appeal, but the motions of Drs. Ellis

and Porecki for judgment N.O.V. were pending at that time and were not ruled on until April 13, 1988. Smith did not thereafter file a new notice of appeal. Because F.R.A.P. 4(a)(4) rendered Smith's premature notice of appeal a nullity, see Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251, 253-54 (1986), and because without a valid and timely notice of appeal the Fourth Circuit lacked jurisdiction, see Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982), the Fourth Circuit was without jurisdiction to entertain Smith's appeal unless he had submitted a document that was the "functional equivalent" of a notice of appeal. See Torres v. Oakland Scavenger Co., 487 U.S. 312, 316-17 (1988).

Smith contends that the informal brief he submitted on or before May 4,

1988, pursuant to instructions from the clerk of the Fourth Circuit, was this functional equivalent. This contention is without merit. As set forth below, there are five reasons why Smith's informal brief should not be permitted to serve a dual function as Smith's notice of appeal.

I.

PERMITTING MR. SMITH'S INFORMAL BRIEF TO SERVE THE DUAL PURPOSE OF A NOTICE OF APPEAL WOULD COLLAPSE TWO DISTINCT AND IMPORTANT STEPS IN THE APPELLATE PROCESS INTO ONE STEP, IN CONTRAVENTION OF THE APPELLATE RULES

The notice of appeal serves an important role in the appellate process. As this Court noted in Griggs, "[t]he filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects

of the case involved in the appeal." 459 U.S. at 58. Moreover, the requirement of filing a notice of appeal serves the purpose of "set[ting] a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made and if it has not, [of advising] prospective appellees that they are freed of the appellant's demands." Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257, 264 (1978) (quoting Matton Steamboat Co. v. Murphy, 319 U.S. 412, 415 (1943)).

In accordance with the importance of the notice of appeal, appellate rules 3 and 4 spell out in considerable detail numerous filing, service, and content requirements for notices of appeal. The critical role of the notice of appeal is also reflected in the requirement that the notice of appeal be a filing

separate from other documents, such as appellate briefs, that are filed to accomplish markedly different steps in the appellate process. As the Fourth Circuit in this case noted:

> [A]n appellate brief will not substitute for a notice of appeal, even if it otherwise meets the requirements of Fed. Rules App. P. 3 and 4. The Federal Rules of Appellate Procedure envision the notice of appeal and the appellate brief as two separate filings. To collapse the two into one would, as the Eleventh Circuit implied, "eliminate entirely the requirement for the filing of a notice of appeal."

Joint Appendix at 37 (quoting United States v. Cooper, 876 F.2d 1192, 1196 (5th Cir. 1989), which in turn quoted Florida Women's Medical Clinic, Inc. v. Smith, 706 F.2d 1172, 1173 (11th Cir. 1983)).

There is no support in the text of the appellate rules for Smith's position that his appellate brief should be

permitted to serve also as his notice of appeal. F.R.A.P. 3(c) refers to Form 1 in the appendix of forms as a suggested form of a notice of appeal. Form 1 (attached as Appendix 1 to this brief), manifestly, is a document separate from, and very different from, an appellate brief. Moreover, F.R.A.P. 3(d) requires the clerk of the district court to "serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record." F.R.A.P. 31(a), however, sets forth service requirements for appellate briefs different from those in F.R.A.P. 3(d); under F.R.A.P. 31(a) the appellant, not the clerk, is responsible for service. Further, F.R.A.P. 25(a) provides that documents such as notices of appeal filed with the Fourth Circuit clerk's office shall be deemed filed as of receipt, but briefs shall be deemed filed as of the day of

mailing. Were one to assume, therefore, that appellate briefs may serve as notices of appeal, then one must assume also that the appellate rules provide for duplicative service of the appellate briefs when so employed, and that the appellate brief has one date of filing in its capacity as a brief and another in its capacity as a notice of appeal. Such an assumption is inconsistent with the Appellate Rules Advisory Committee's vision of the appellate rules as an integrated set of rules that in an orderly manner cover all steps in the appellate process. See Advisory Committee Notes to 1979 Amendments to the Federal Rules of Appellate Procedure, Note to Rule 1. (Attached as Appendix 2).

Smith, in contending for his position, places his chief reliance on the last sentence in Rule 3(c), which

reads: "An appeal shall not be dismissed for informality of form or title of the notice of appeal." There is no dispute that the Rules Advisory Committee intended by this language to impart a measure of flexibility to the determination whether a particular paper should be accepted as a notice of appeal. Accepting a "Motion for Certificate of Probable Cause" in a habeas corpus proceeding, see, e.g., Holley v. Capps, 468 F.2d 1366 (5th Cir. 1972) (cited as illustrative in 1979 Advisory Committee Note to Rule 3(c)), or a "Petition for Leave to Appeal under 28 U.S.C. § 1292(b)," see, e.g., Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974) (same), as functional equivalents for notices of appeal may reasonably be seen as within the scope of lenience intended by this language. There is a logical difference, however, between accepting

documents similar to notices of appeal as substitutes for notices of appeal and eliminating the requirement for filing a separate notice of appeal altogether. Accepting a "Petition for Leave to Appeal under 28 U.S.C. 1292(b)" as a notice of appeal is an example of the former; permitting an appellate brief to serve a dual purpose as a notice of appeal is an example of the latter.

Smith contends also that "federal courts have long held that a single document may serve two purposes under the rules." Petitioner's Brief at 15. Whether or not lower courts have so held, of course, is not controlling on this Court. As a matter of fact, however, cases supporting Smith's proposition are a good deal more sparse than Smith's enumeration of cases might suggest. Smith refers to the cases collected in Coppedge v. United States,

369 U.S. 438 (1962) in support of his view. Of the seven cases collected in Coppedge, however, three did not involve a document that was employed for multiple purposes. See Lemke v. United States, 346 U.S. 325 (1953) (notice of appeal filed prior to judgment); Belton v. United States, 259 F.2d 811 (D.C. App. 1958) (letter written to District Court); Williams v. United States, 188 F.2d 41 (D.C. App. 1951) (notice of appeal delivered to prison officials). Two of the others involved petitions for leave to appeal in forma pauperis. See Tillman v. United States, 268 F.2d 422 (5th Cir. 1959); West v. United States, 222 F.2d 774 (D.C. App. 1954). None of the cases involved use of an appellate brief as a notice of appeal.

Similarly, several of the cases cited by Smith in footnote 8 of his brief did not involve a document

employed for multiple purposes, but rather mislabeled or misconceived notices of appeal. See In Re Bertoli, 812 F.2d 136, 138 (3d Cir. 1987) (motion for certification of an interlocutory appeal); San Diego Committee Against Registration & Draft (CARD) v. Governing Board of Grossmont Union High School District, 790 F.2d 1471, 1474 (9th Cir. 1986) (motion for permission to appeal order pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure); Yates v. Mobile County Personnel Board, 658 F.2d 298, 299 (5th Cir. Unit B 1981) ("Petition for Supervisory Writ of Mandamus and Certiorari"). There have in fact been only three instances in which any court has permitted an appellate brief to serve a dual purpose as a notice of appeal. See Allah v. Superior Court of State of California, 871 F.2d 887, 889-90 (9th Cir. 1989);

Finch v. City of Vernon, 845 F.2d 256, 259-60 (11th Cir. 1988) (per curium); Frace v. Russell, 341 F.2d 901, 903 (3d Cir.), cert. denied, 382 U.S. 863 (1965). In none of these cases did the court address the issue that the Fourth Circuit in the present case and the Fifth Circuit in United States v. Cooper, 876 F.2d 1192, 1196 (5th Cir. 1989) found of critical importance: namely, that permitting an appellate brief to serve a dual function as a notice of appeal would, for a class of cases, eliminate the requirement for filing a separate notice of appeal. See also Jurgens v. McKasy, 905 F.2d 382, 385 n.4 (Fed. Cir. 1990) (holding that appellate brief may not serve as notice of appeal and citing United States v. Cooper.)

Smith relies also on Torres v. Oakland Scavenger Co., 487 U.S. 312

(1982). This reliance is misplaced. In Torres, this Court held that the use of "et al." in lieu of naming a party in a notice of appeal, even if it were a harmless error, was not mere excusable "informality," but rather a jurisdictional defect. The Court noted that "[p]ermitting imperfect but substantial compliance with a technical requirement is not the same as waiving the requirement altogether as a jurisdictional threshold." 487 U.S. at 315-16. Torres is precedent for a strict interpretation of F.R.A.P. 3, not for the view Smith advocates.

The essence of the issue presented by Smith's appeal lies in the difference between textual interpretation and textual amendment of the appellate rules. One may well believe that appellate briefs should be permitted to serve also as notices of appeal. The

appellate rules, however, do not provide for this. To read such a provision into the rules would circumvent the constitutionally-based process by which amendments to the appellate rules, in accordance with 28 U.S.C. § 2074, are proposed, reported to Congress, and promulgated. See Houston v. Lack, 487 U.S. 266, 283-84 (1988) (dissenting opinion of Justice Scalia).

This Court rejected this type of judicial amendment in Mohasco Corporation v. Silver, 447 U.S. 807 (1980). There, the respondent presented reasons why the word "filed" should have different meanings in the same section of § 706(c) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(c)). This Court rejected respondent's contentions, noting:

> In the end, we cannot accept respondent's position without unreasonably giving the word "filed" two different meanings

> in the same section of the statute. Even if the interests of justice might be served in this particular case by a bifurcated construction of that word, in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

447 U.S. at 826. See also Hallstrom v. Tillamook County, 110 S.Ct. 304, 311 (1989). This reasoning applies with equal strength to the present case.

II.

BECAUSE THE TIMING, CONTENT, AND RECIPIENTS OF SMITH'S INFORMAL BRIEF WERE DETERMINED LARGELY BY THE FOURTH CIRCUIT AND NOT SMITH, ESSENTIAL PREREQUISITES FOR INVOKING THE FUNCTIONAL EQUIVALENT DOCTRINE ARE LACKING

In Torres, this Court, setting forth the functional equivalent doctrine, stated as follows:

> [I]f a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may

> nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires.

487 U.S. at 316-17. As this statement indicates, the functional equivalent doctrine rests on the premise that the filing in question represents the "litigant's action." If, therefore, the filing represents the action of someone other than the litigant, the functional equivalent doctrine is not properly invoked. Such is the case in this instance. To understand this, it is necessary to consider the Fourth Circuit's procedure for filing informal briefs.

Informal briefs are employed in pro se appeals in the Fourth Circuit pursuant to Fourth Circuit Local Rule 34(b) and Fourth Circuit Internal Operating Procedures 34.6 and 46.5. The procedure is not initiated by the pro se

litigant but by the Fourth Circuit Clerk. The Clerk, on learning that the appeal is pro se, begins the process by sending copies of blank pre-printed informal brief forms, together with instructions, to persons the Clerk determines to be parties.

Appendix 3 to this brief demonstrates how this procedure worked in the present case. Appendix 3 is the "Order to Proceed on Informal Brief" and blank informal brief form filed by the Fourth Circuit and sent to Dr. Barry's attorney and all other parties.[1/]

1/ The "Order to Proceed on Informal Brief" is also set forth in the Joint Appendix. Because Smith's appeal is in forma pauperis, however, the "Copies to" list was deleted from the Order in the Joint Appendix. Appendix 3 is a complete version of the Order and blank informal brief form. Copies of the Order and blank informal brief form accompany respondent Barry's

(Footnote continued to next page)

Examining Appendix 3, one sees first that the Clerk sent the Order and blank informal brief form on or about April 13, 1988, and instructed the recipients that "parties electing to submit briefs shall mail their briefs to the Court, with copies to all parties, NO LATER THAN May 4, 1988." Hence, the fact that Smith's filing of his informal brief fell within the 30 day time limit established by F.R.A.P. 4(a)(4) is attributable largely, if not entirely, to the Clerk's instructions, rather than to any decision made by Smith.

A second material feature of Appendix 3 is the "Copies to" list. This list contained numerous persons

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(Footnote continued from previous page)

1/ April 19, 1991 opposition to petitioner Smith's petition for a writ of certiorari.

connected to the case, including respondents' counsel. Smith asserts before this Court that his informal brief is the functional equivalent of a notice of appeal because it adequately apprised the respondents of Smith's intention to appeal. The fact that respondents ever received Smith's informal brief, however, would appear more a consequence of the Clerk having placed respondents' counsel on the "Copies to" list and having instructed Smith, both in the Order (paragraph 3) and in bold letters at the end of the blank informal brief, to send copies of the brief "to all parties in the case," than a consequence of any decision made by Smith. As the final pages of Smith's informal brief (attached as

Appendix 4)[2/] indicate, Smith sent copies to the precise list of persons set forth in the Clerk's "Copies to" list.

Another relevant feature of the Fourth Circuit's informal brief is that it consists of numerous questions propounded by the Fourth Circuit, with spaces left for the litigants' responses. Respondents deny that Smith's informal brief satisfied the specificity requirements of F.R.A.P 3(c). In any event, however, it is manifest that the content of Smith's informal brief was a function of the questions posed by the Fourth Circuit. This fact places in doubt whether the informal brief is properly characterized

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2/ A copy of Smith's actual informal brief may be found in the Joint Appendix to the Fourth Circuit appeal at app. 108.

as Smith's "action" for purposes of the functional equivalent doctrine.

The premise that underlies the functional equivalent doctrine, at least implicitly, is that the putative appellant has performed an act that approximates the timely filing of a valid and reasonably specific notice of appeal. The only acts Mr. Smith performed in this instance with respect to his informal brief, however, were to respond to questions posed by the Fourth Circuit and to comply with explicit instructions from the Fourth Circuit regarding the filing and service of his informal brief. These acts do not manifest the degree of control and intention necessary to justify accepting Smith's informal brief as a surrogate for his notice of appeal.

A final consideration bears mention. It appears that only four of

the circuits -- the Fourth, Sixth, Ninth, and Federal Circuits -- provide for the filing of informal briefs. Counsel for respondents have looked with care through the caselaw and local rules and internal operating procedures of all other circuits and not found any rule or procedure comparable to the informal brief procedure. This informal brief procedure, at least in the Fourth Circuit, is set in motion promptly and, as this case illustrates, it can easily be set in motion by a premature or otherwise defective notice of appeal. Were this Court, therefore, to accept appellate briefs generally as surrogate notices of appeal, this holding would undoubtedly benefit pro se litigants in the four mentioned circuits more than other types of litigants and more than litigants in the other circuits. The goal of procedural and jurisdictional

uniformity within the federal judicial trial system is ill-served by such a result.

III.

SMITH DOES NOT MERIT THE SOLICITUDE NORMALLY AFFORDED PRO SE LITIGANTS

Smith contends that his pleadings should be treated with solicitude because he was a pro se litigant. Pet. Brief at 23 n.14. It is true, certainly, that this Court has recognized that pro se litigants, and particularly incarcerated pro se litigants, often labor under numerous limitations that, in fairness, a court must take into account. See Houston v. Lack, 487 U.S. 266, 270-72 (1988); Fallen v. United States, 378 U.S. 139 (1964). The factors justifying solicitude toward pro se litigants, however, are lacking in this case.

The fundamental premise underlying special lenience for pro se litigants is that the litigant has "done all he could do" to comply with the rule in question. Thus in Fallen a criminal defendant seeking to appeal had deposited his notice of appeal with prison authorities for mailing two days before the 10-day filing deadline. During the prior eight days the defendant had been ill and confined in a hospital, where he was not permitted to have visitors or afforded the opportunity to secure an attorney. The defendant's notice of appeal did not arrive at the clerk's office until four days after the deadline. On these facts this Court concluded that "[s]ince petitioner did all he could under the circumstances, we decline to read the Rules so rigidly as to bar a determination of his appeal on the

merits." 378 U.S. at 144. This Court reached a similar conclusion on somewhat similar facts in Houston. See 487 U.S. at 276.

The fact patterns in Fallen and Houston do not correspond to the present one. Smith did not "do all he could do" to comply with Rule 3's notice of appeal requirement. Smith obviously understood at least the rudiments of filing a notice of appeal, since he filed a notice of appeal pro se on March 22, 1988. Thereafter, on April 21, 1988 he received a letter from Leo P. Hylan, his attorney at trial, telling him that this notice of appeal was premature and thus void. Joint Appendix at 17. Mr. Hylan advised Smith that he had until May 13, 1988 to file a new and valid notice. For all that appears in the record, Smith, on receiving this admonition, had

abundant time to comply. He did not do so.

Smith asserts that this admonition from Mr. Hylan should be discounted or ignored because at the time Smith received Mr. Hylan's letter no "genuine attorney-client relationship" existed. Pet. Brief at 24 n. 14. The critical fact, however, is that Smith was informed that his March 22 notice of appeal was premature and void from a person who Smith had reason to believe understood such matters. Smith ignored Mr. Hylan's advice. However broadly one might wish to interpret the doctrine of special lenience for pro se litigants, a pro se litigant must be held to some degree of responsibility for his acts or failures to act, particularly when he, in fact, received timely and accurate advice from his former counsel.

IV.

EVEN IF SMITH'S INFORMAL BRIEF WERE DEEMED A NOTICE OF APPEAL, THE BRIEF FAILS TO SATISFY THE SPECIFICITY REQUIREMENTS OF FEDERAL RULE OF APPELLATE PROCEDURE 3(C)

Even were this Court to deem Smith's informal brief a proper substitute for a notice of appeal, Smith has not thereby established that the Fourth Circuit had jurisdiction over Smith's appeal. Where, as here, pre-trial motions and the trial have generated multiple appealable judgments or orders, a party wishing to appeal must designate from which of the judgments or orders it is appealing. This specificity requirement is contained in F.R.A.P. 3(c), which states in relevant part:

> Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment,

> order or part thereof appealed from; and shall name the court to which the appeal is taken.

Compliance with F.R.A.P. 3(c) is a jurisdictional prerequisite. Torres, 487 U.S. at 317.

This Court in Torres, in addition to establishing that compliance with Rule 3(c) is a jurisdictional prerequisite, also set forth a standard by which such compliance is measured. It is one of literal and exact compliance. This Court recognized that this exacting standard may lead to harsh results, but held that this harshness was "imposed by the legislature and not by the judicial process." Torres, 487 U.S. at 318 (quoting Schiavone v. Fortune, 477 U.S. 21, 31 (1986)).

The best way to apply the Torres standard to the present facts is by a comparison of the language there found inadequate with the language from

Smith's informal brief that he contends satisfies Rule 3(c). In Torres the critical words were "et al.," used in the notice of appeal to designate the parties taking the appeal. The Court held that these words did not give fair notice of the specific individual or entity seeking to appeal, and thus the jurisdictional and specificity requirements of Rule 3(c) were not met. 487 U.S. at 317. In the present case the informal brief proposed by Smith as satisfying Rule 3(c)'s requirements contains not one reference to Dr. Barry or to the district court's December 26, 1984 Order dismissing Dr. Barry, nor does it make any specific reference to the district court's February 29, 1988 Order entering judgment in favor of the prison guards on Smith's deliberate indifference claim.

To establish compliance with Rule 3(c), Smith relies entirely on his request in the informal brief for "[a] new trial on all issues triable by jury." This language, however, can hardly be interpreted as referring specifically to the Order dismissing Dr. Barry. That Order was not an "issue triable by jury." The issue regarding dismissal of Dr. Barry had been decided by Judge Black long before any jury had been empanelled, and Smith knew this.

Nor does this uncertain phrase, read together with Smith's other allegations in his informal brief, satisfy Rule 3(c)'s specificity requirement with respect to the February 29, 1988 Order dismissing the prison guards. Reading the informal brief as a whole, it is apparent that Smith's attention was concentrated on an alleged collusion between his attorney and the

defendants' attorney that purportedly led to the suppression of allegedly relevant medical records. There is no indication that that issue related in any way to the prison guards.

Smith cites the Supreme Court's decision in Foman v. Davis, 371 U.S. 178 (1962) to support his argument that the language in his informal brief is adequately specific. Foman does not support this conclusion. In Foman, a second notice of appeal which did not specifically designate the order appealed from was held to be effective to bring up the merits of the dispute, where the first, ineffective notice of appeal supplied the missing information; the Court held that both notices of appeal should be considered. 371 U.S. at 181. In the present case, by contrast, the first, ineffective notice of appeal not only fails to supply the

required specificity, it confirms that Smith did not intend to appeal the Orders dismissing Dr. Barry and the prison guards. Smith's premature and ineffective notice of appeal states that Smith intended to appeal from "the judgment/order . . . entered in this action on March 15, 1988." (Joint Appendix at 10.) The March 15, 1988 Order related to a motion for attorney's fees. (Joint Appendix at 2.) The order dismissing Dr. Barry was dated December 26, 1984, and entered on January 4, 1985. (Joint Appendix at 1.) The Order dismissing the prison guards was entered on February 29, 1988. (Joint Appendix at 2.)

It is true that, in line with Haines v. Kerner, 404 U.S. 519 (1972), a liberal construction of notices of appeal prepared by pro se litigants has been deemed appropriate. Yet some

limits to this liberality must be imposed. As the Fourth Circuit noted in Shah v. Hutton, 722 F.2d 1167, 1168 (4th Cir. 1983), with respect to F.R.A.P.4: "[t]he fact that plaintiffs are incarcerated and are proceeding pro se does not change the clear language of the Rule." Even if an informal brief were allowed to substitute for a notice of appeal, to go beyond this and read into the informal brief language it does not contain surely crosses the line from liberal construction to an impermissible elimination of jurisdictional requirements.

V.

WHAT SMITH DID OR FAILED TO DO TO SATISFY HIS REQUIREMENT OF FILING A VALID AND TIMELY NOTICE OF APPEAL, AND NOT WHAT RESPONDENTS MAY HAVE SURMISED REGARDING SMITH'S INTENTIONS TO APPEAL, DETERMINES THE FOURTH CIRCUIT'S APPELLATE JURISDICTION

Smith asserts that the fact that respondents filed informal briefs and that initially they did not address the deficiencies in Smith's notice of appeal demonstrates that respondents acquiesced in Smith's appeal and were not prejudiced by Smith's failure to file a valid and timely notice of appeal. Pet. Brief at 25-28. Smith contends that this alleged absence of prejudice should be a factor in determining the adequacy of Smith's informal brief as a surrogate notice of appeal. This contention is wide of the mark in thtee respects.

First, the respondents' filing of informal briefs was the result of obedience to instructions from the Fourth Circuit rather than a result of adequate notice from Smith regarding his intentions to appeal. The instructions respondents received from the Fourth Circuit with the blank informal brief form were captioned "ORDER TO PROCEED ON INFORMAL BRIEF." This Order advised the respondents that, unless they elected to file formal briefs, "the case shall be submitted . . . on informal briefs." The respondents were faced with instructions in peremptory language from the Fourth Circuit, and they responded accordingly.

Second, on April 28, 1988, when Dr. Barry submitted his initial informal brief, the Fourth Circuit's decision in Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984), cert. denied, 471 U.S. 132

(1985), was good law and entirely dispositive of Smith's appeal. Dr. Barry relied upon Calvert and, until Calvert was overturned, had little reason to present additional arguments.

Finally, and most importantly, Smith's filing of a valid and timely notice of appeal is a jurisdictional requirement. Harmless error analysis, therefore, is inappropriate. Torres, 487 U.S. at 317 n.3. The proper focus must be on what Smith did or failed to do to perfect his appeal, not on what other parties may have surmised about Smith's intentions. Smith filed neither a valid notice of appeal nor its functional equivalent, and whatever beliefs respondents may have had concerning Smith's intentions cannot cure this jurisdictional defect.

CONCLUSION

For the reasons set forth above, Smith's informal brief should not be deemed the functional equivalent of a notice of appeal. The Fourth Circuit therefore lacked jurisdiction over Smith's appeal, and its judgment dismissing Smith's appeal should be affirmed.

Respectfully submitted,

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APPENDIX 1

Form 1. NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

United States District Court for the _____ District of _____

A.B., Plaintiff)
v.) File No. _____
C.D., Defendant)

Notice of Appeal

Notice is hereby given that C.D., defendant above named, hereby appeals to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from the order (describing it)) entered in this action on the _____ day of _____, 19__.

(S)_____

_____
(Address)

Attorney for C.D.

APPENDIX 2

ADVISORY COMMITTEE NOTES TO 1979 AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PRODECURE

Rule 1. Scope of Rules

(a) SCOPE OF RULES. These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court [of the United States]; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.

Advisory Committee Note

The Federal Rules of Appellate Procedure were designed as an integrated set of rules to be followed in appeals to the courts of appeals, covering all steps in the appellate process, whether they take place in the district court or in the court of appeals, and with their adoption Rules 72-76 of the FRCP were abrogated. In some instances, however, the FRAP provide that a motion or application for relief may, or must, be made in the district court. See Rules

4(a), 10(b), and 24. The proposed amendment would make it clear that when this is so the motion or application is to be made in the form and manner prescribed by the FRCP or FR Cr P and local rules relating to the form and presentation of motions and is not governed by Rule 27 of the FRAP. See Rule 7(b) of the FRCP and Rule 47 of the FR Cr P.

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-7096

Smith v. Galley

[FILED: April 13, 1988
U.S. Court of Appeals
Fourth Circuit]

ORDER TO PROCEED ON INFORMAL BRIEF

This appeal having been filed in this Court and it appearing that at least one party is proceeding without counsel, IT IS ORDERED:

1. The case shall be submitted on the lower court record and, at the election of the parties, on informal briefs, the form for which is attached. Parties may, but need not, cite statutes and legal authority to support their contentions. Only the basic facts and issues need be set forth, as requested on the form. If a supporting memorandum

is essential to address the issues adequately, it may be attached to the briefing form.

The Court will review the entire record on appeal for possible meritorious issues; it will not limit its review solely to the issues raised in the parties' briefs.

2. The six-digit docket number appearing on the first page of this order shall be placed prominently on every paper filed by any party to this appeal, as well as on all correspondence addressed to the Court.

3. Parties electing to submit informal briefs shall mail their briefs to the Court, with copies to all parties, NO LATER THAN May 4, 1988.

4. The original and one copy of the parties' briefs shall be mailed to the Court, with first class postage

pre-paid and affixed, addressed as follows:

United States Court of Appeals
for the Fourth Circuit
United States Courthouse
10th and Main Streets
Richmond, VA 23219

5. Every document mailed to the Court by any party must bear a notation that a complete copy thereof was mailed to all other parties at the same time; the Court must receive the original and one copy of every such document. The notation must show the complete name and mailing address of the persons to whom the copies were sent and the date of mailing.

6. Extensions of briefing deadlines are not favored by the Court and are granted only for good cause stated in writing. Requests for extensions MUST BE RECEIVED BY THE COURT BEFORE THE EXPIRATION OF THE DEADLINE.

7. Transcript of trial proceedings WILL NOT be prepared at government expense except in those limited cases in which the Court concludes from the briefs, the claims of the parties, and the record that the appeal presents a substantial question that cannot be determined without a transcript.

8. The Court will not appoint counsel or schedule an appeal for oral argument unless it concludes, after having reviewed the case, that the appeal cannot be decided on the basis of the informal briefs and the record. Therefore, it is unnecessary to request the appointment of counsel or oral argument.

9. Appellants may, but need not, file a docketing statement within 10 days of filing of the notice of appeal.

The form and instructions should already have been provided to appellant by the district court.

JOHN M. GREACEN
CLERK

Copies to:

William Lewis Smith
ROXBURY CORRECTIONAL INSTITUTION
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Hagerstown, MD 21740

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

88-7096 Smith v. Galley
CA-83-3395-B

INFORMAL BRIEF

Directions: Answer the following questions about the appeal to the best of your ability. Use additional sheets of paper, if necessary. You need not limit your brief solely to this form but you should be certain that whatever you file answers the questions below. In any event, the court prefers short and direct statements.

1. Did the district court fail to consider important grounds for relief. If so, what grounds?

2. Did the district court incorrectly decide the facts? If so, what facts?

3. Do you think the district court applied the wrong law? If so, what law do you want applied?-

4. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

5. What action do you want the Court to take in this case?

6. If you think the Court should hear oral argument in this case, why do you think so?

_____
Signature
NOTARY NOT REQUIRED

IMPORTANT: A COPY OF THIS BRIEF AND ANY ATTACHMENTS MUST BE SENT TO ALL PARTIES IN THE CASE. PLEASE LIST BELOW THE NAMES AND ADDRESSES OF THE PARTIES WHO WERE SENT A COPY OF YOUR BRIEF, TOGETHER WITH THE DATES ON WHICH THEY WERE SENT.

APPENDIX 4

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

88-7096 Smith v. Galley
CA-83-3395-B

INFORMAL BRIEF

Directions: Answer the following questions about the appeal to the best of your ability. Use additional sheets of paper, if necessary. You need not limit your brief solely to this form but you should be certain that whatever you file answers the questions below. In any event, the court prefers short and direct statements.

1. Did the district court fail to consider important grounds for relief. If so, what grounds?

   (a) Yes. The court only appointed counsel to represent the Plaintiff on his 42.U.S.C. 1983 complaint. The plaintiff had filed on July 26, 1985, "Motion For Leave To File Amended Complaint or Supplemental Complaint" into the Court seeking counsel for his serious medical problems, and requesting a Preliminary Hearing. Requesting appointment of Counsel.

   (b) The Court appointed counsel and at trial The plaintiff counsel and the defendants' counsel concealed vital evidence ... See attached extra sheet, 1-b.

2. Did the district court incorrectly decide the facts? If so, what facts?

   It is Plaintiff contention that the Court and Jury was unable to rule fairly to the facts, and the awarding of damages in to Plaintiff, due to the facts that vital evidence (medical records, exhibits, witness, and other issues of extreme importance to my case.) was being suppressed by Plaintiff's counsel and the defendants' counsel. This suppression by both attorneys', of evidence, was done without my knowledge and against my wishes. The plaintiff had requested in his complaint to properly conduct his medical records in open court.

3. Do you think the district court applied the wrong law? If so, what law do you want applied?

   I don't know.

4. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

(a) A conflict of Interest; the lawfirm of WHITEFORD, TAYLOR & PRESTON, and plaintiff's counsel are affiliated to participants in plaintiff's previous lawsuit, which is the parties members. Thus, the plaintiff was denied his constitutional right to a fair and impartial trial for the reason that Plaintiff attorney failed to adequately and competently represent him; also, Plaintiff was denied his constitutional right to due process and equal protection of law. Thus, the plaintiff beleave this resulted in the Court being unable to render a fair decision in my case.

5. What action do you want the Court to take in this case?

(1) A new trial on all issues triable by Jury.

(2)(a) That Plaintiff's medical records are properly conducted in the Court. (b) The Court to investigate conflict of Interest. The plaintiff beleave that there were conspiracy acts by his attorney and defendants' attorney, to suppress plaintiff medical records; thus, leaving the Court and Jury unable to render a fair decision and/or verdict in the Plaintiff Case. (c) The Plaintiff beleave that the Court should review all evidence pretaining to this case, and the award of damages

which plaintiff do beleave was grossly inadequate ... See attached extra sheet; 5-d.

6. If you think the Court should hear oral argument in this case, why do you think so?

Yes, the Plaintiff do beleave in all fairness to his case, and for himself, his legal counsel, and/or representative, to be allowed to hear in open Court Plaintiff's medical records, presentment of all evidence, be it physical or oral, the Plaintiff do beleave that it will give the Court and Jury a clearer vision of Plaintiff's medical condition, that his counsel and defendants counsel suppressed from the Court by ruleing out.

/s/William Lewis Smith
Signature
NOTARY NOT REQUIRED

Dated: April 23, 1988

IMPORTANT: A COPY OF THIS BRIEF AND ANY ATTACHMENTS MUST BE SENT TO ALL PARTIES IN THE CASE. PLEASE LIST BELOW THE NAMES AND ADDRESSES OF THE PARTIES WHO WERE SENT A COPY OF YOUR BRIEF, TOGETHER WITH THE DATES ON WHICH THEY WERE SENT.

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Charles Preston Scheeler
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Copies to: ATTACHED TO BRIEF:

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88-7096 Smith v. Galley, et al.
CA-83-3395-B

William Lewis Smith
ROXBURY CORRECTIONAL INSTITUTION
Route 3, Box 4444
Hagerstown, MD 21740

ATTACHED - Extra Sheet from informal brief:

Continued; 1-b

... (medical records, exhibits, witnesses, and other issues of extreme importance to the Plaintiff's case.) thus, the Plaintiff beleave that the Court and Jury was unable to render a fair verdict and/or decision in his case. This suppression of evidence was done without his knowledge and against his wishes.

Continued; 5-d

... to the suffering the Plaintiff have been subject to, and what he is still enduring. (e). That a U.S. Federal Investigation by the U.S. Justice Department and U.S. Attorney, and to take legal action against all parties who are responsible for their conspiracy to commit fraud, wrong doing, malice, etc., etc., to the Plaintiff. (f). Appellant cost of this suit. (g). Such other and futher relief as law and justice may require.

/s/William Lewis Smith
WILLIAM LEWIS SMITH

Dated: April 28, 1988

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed by certification on April 28, 1988, to the following:

/s/William Lewis Smith
WILLIAM LEWIS SMITH

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APPENDIX 5

APPEAL AS OF RIGHT -- HOW TAKEN

FRAP 3.

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any other step than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6, respectively.

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

(d) Service of the Notice of Appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the last known address of that party; and the clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

APPEAL AS OF RIGHT -- WHEN TAKEN

FRAP 4.

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the Clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

FILING AND SERVICE

FRAP 25.

(a) Filing. Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to ~~the~~ clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the date of filing and shall thereafter transmit it to the clerk.

FILING AND SERVICE OF BRIEFS

FRAP 31.

(a) Time for Serving and Filing Briefs. The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

APPENDIX 6

FOURTH CIRCUIT LOCAL RULE 34(b)
INFORMAL BRIEFS

Whenever an application for a certificate of probable cause from the denial of a writ of habeas corpus or an appeal taken from the denial of a motion under 28 U.S.C. § 2255, or any pro se appeal shall be filed, the Clerk shall notify the appellant that he may file, within twenty-one days after receipt of such notice, an informal brief, describing the grounds upon which he claims he is entitled to relief and setting forth the merits of his appeal. Any such informal brief filed by any party shall be considered, together with the record and other relevant papers, by the panel to which the proceeding has been referred.

Parties proceeding pursuant to this section shall be provided copies of this local rule by the clerk.

FOURTH CIRCUIT INTERNAL
OPERATING PROCEDURE 34.6

Informal Briefs. Local Rule 34(b) has established a procedure for the filing of "informal briefs" in certain cases. The informal brief may be submitted on a form provided by the Clerk and should provide specific information about the case in response to questions appearing on the form. The parties need not limit their briefs solely to the form. It is not necessary to cite cases in an informal brief. An additional supporting memorandum may be submitted if a party deems it necessary in order to address adequately the issues raised. Two copies of the brief and memorandum, if any, must be filed wit the Court and a copy mailed to opposing counsel.

Once an informal briefing schedule has been established the parties may file a formal brief only with the permission of the Court. The Court initially reviews cases that are informally briefed under its procedures set forth in Local Rule 34(a) pertaining to pre-argument review. The Court does not limit its review to the issues raised in informal briefs, but reviews the entire record on appeal for possible meritorious issues.

FOURTH CIRCUIT INTERNAL OPERATING PROCEDURE 46.5

Proceeding Pro Se. An individual may proceed without the aid of counsel, but should so inform the Court at the earliest possible time. In any pro se appeal, the Clerk shall notify the parties that they shall file informal briefs as provided by Local Rule 34(b). The Court will independently review the record for meritorious claims and will also consider the need for the appointment of counsel when reviewing the appeal under Local Rule 34(a). Cases involving pro se litigants are ordinarily not scheduled for oral argument.

APPENDIX 7

28 U.S.C. § 2074. RULES OF PROCEDURE AND EVIDENCE; SUBMISSION TO CONGRESS; EFFECTIVE DATE

(a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.

(b) Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.